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FCC Record

A comprehensive compilation of decisions, reports, public notices and other documents of the Federal Communications Commission of the United States.

FEDERAL COMMUNICATIONS COMMISSION

***James H. Quello, Chairman**

****Sherrie P. Marshall**

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*Commissioner Quello designated as Chairman effective February 5, 1993.
**Commissioner Marshall resigned effective April 30, 1993.

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Federal Communications Commission Record

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Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

ALLNET COMMUNICATION
SERVICES, INC.,
Complainant,

v. File No. E-91-112

THE BELL ATLANTIC
TELEPHONE COMPANIES,
Defendants.

MEMORANDUM OPINION AND ORDER

Adopted: July 15, 1993; Released: August 9, 1993

By the Commission:

I. INTRODUCTION AND BACKGROUND

1. We have before us a petition for reconsideration filed by the Bell Atlantic Telephone Companies[1] seeking reconsideration of our action in *Allnet Communication Services, Inc. v. The Bell Atlantic Telephone Cos., et al.*[2] In the *Damages Order*, we held that the complainant had met its burden of establishing that the defendants had violated the Communications Act (the "Act") by earning in excess of the Commission's prescribed rate of return in one or more access service categories for the period January 1, 1987 through December 31, 1988.[3] We further held that the complainant is entitled to recover monetary damages from the defendants to the extent it could establish that it suffered actual damage as a consequence of the defendants' violations.[4]

2. In addressing the complainant's claim for damages, we found it appropriate to look in the first instance at the difference between the amount complainant actually paid for defendants' access services during the relevant period and the amount it would have paid if the defendants' rates had produced earnings within the prescribed levels.[5] We concluded, however, that it is proper for defendants to offset the complainant's damages claims with evidence showing that the complainant benefitted by purchasing other access services from defendants during the relevant period at rates that produced earnings below the Commission's prescribed levels. Thus, defendants were permitted to offset damages claims by showing that the complainant underpaid, in effect, for other access services purchased from defendants during the same period.[6] We also held that the complainant is entitled to prejudgment interest on its damage award computed at the Internal Revenue Service (IRS) rate for tax refunds.[7]

II. CONTENTIONS OF THE PARTIES

3. In seeking reconsideration, Bell Atlantic argues that the Commission erred by failing to permit Bell Atlantic to offset Allnet's damage claims by $100,000, the amount which Bell Atlantic claims Allnet has already withheld for overcharges for interstate access services during the 1987-1988 monitoring period.[8] According to Bell Atlantic, the Commission improperly characterized its offset claim as a "billing and collection" matter and wrongfully concluded that the Commission "lacks authority under Section 208 of the Act to resolve billing and collection disputes of this nature."[9] Bell Atlantic argues that Allnet's "self-help" actions did not evolve from a billing and collection dispute, but rather represented an attempt by Allnet to prematurely obtain a portion of the damages it believed it would be entitled to as a result of its Section 208 complaint.[10] Bell Atlantic cites correspondence sent from Allnet to Bell Atlantic in which Allnet advised Bell Atlantic that it was withholding the amount in question because it believed that it was entitled to payments stemming from Bell Atlantic's 1987-1988 interstate access overearnings.[11] Bell Atlantic argues that it is clear that Allnet withheld the $100,000 based on the claims raised in its complaint and that Allnet's action was taken "for the *sole* purpose of obtaining a portion of its anticipated damages immediately, rather than waiting for the Commission's processes to run their course."[12] Bell Atlantic contends that the Commission's failure to offset Allnet's damages claim by the amount withheld by Allnet is arbitrary and capricious.

4. In opposition, Allnet maintains that the Commission properly disallowed the $100,000 offset claimed by Bell Atlantic. Allnet contends that Bell Atlantic's criticism of the Commission's decision is based on a misunderstanding of the relationship between Sections 206, 208, 209 and 407

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[1] The Bell Atlantic Telephone Companies (Bell Atlantic) are The Bell Telephone Company of Pennsylvania, the Chesapeake and Potomac Telephone Company, the Chesapeake and Potomac Telephone Company of Maryland, the Chesapeake and Potomac Telephone Company of Virginia, the Chesapeake and Potomac Telephone Company of West Virginia, The Diamond State Telephone Company, and New Jersey Bell Telephone Company. The petition for reconsideration was filed with the Commission on April 5, 1993.

[2] 8 FCC Rcd 1347 (1993) (*Damages Order*).

[3] *Damages Order*, 8 FCC Rcd at 1347, para. 1, citing 47 U.S.C. § 201(b).

[4] *Damages Order*, 8 FCC Rcd at 1347, para. 1.

[5] *Id.* at 1351, para. 21.

[6] *Id.* at 1356, para. 39. Applying these standards, we awarded Allnet damages, exclusive of interest, in the amount of $168,000.

[7] *Id.* at 1358, para. 44.

[8] Bell Atlantic Petition for Reconsideration (Petition) at 1. Bell Atlantic notes that it is not seeking reconsideration of the Commission's underlying rationale from which complainant's damages were calculated. *Id.*, n.2. Rather, Bell Atlantic's petition is limited to the Commission's decision to deny the requested $100,000 offset. *Id.*

[9] Petition at 2, citing *Damages Order*, 8 FCC Rcd at 1356, n.104.

[10] Petition at 2.

[11] *See* Petition at 2, citing Letter from J.H. Snodsmith, Manager, Carrier Administration, Allnet Communication Services, Inc. to M. Cummings, Bell of Pennsylvania, dated May 17, 1990. The letter is attached to Bell Atlantic's petition for reconsideration as Exhibit A.

[12] *Id.* at 3 (emphasis in original). Bell Atlantic claims that Allnet concedes the withheld amount is directly related to the subject matter of its complaints against Bell Atlantic. Reply of the Bell Atlantic Telephone Companies at 1.

of the Communications Act.[13] Allnet argues, in effect, that a Section 208 complaint proceeding is not a collection action for damages, but a proceeding to determine whether and to what extent damages are owed.[14] Allnet contends that the proper forum for Bell Atlantic to raise its offset claim would be in a civil collection action under Section 407 of the Act. Allnet notes that in a Section 407 proceeding, Bell Atlantic would have the option of filing counterclaims based on any related matter.

5. Allnet further claims that Bell Atlantic's offset claim is predicated on the improper assumption that the $100,000 was solely withheld due to 1987-1988 overcharges.[15] Allnet contends, without reference to any support in the record, that the $100,000 withheld also includes amounts attributable to Bell Atlantic's 1985-1986 overcharges. Allnet further contends that Bell Atlantic fails to point out that the $100,000 was withheld from overcharges assessed by only one of Bell Atlantic's operating companies, the Bell Telephone Company of Pennsylvania.

III. DISCUSSION

6. After careful consideration of the facts and arguments presented by the parties, we grant Bell Atlantic's petition and adjust Allnet's damages award by the amount requested.[16] We are now persuaded on the record before us that Bell Atlantic's claims are based not on a billing and collection dispute but on self-help actions taken by Allnet for the express purpose of securing amounts Allnet believed it was entitled to based on Bell Atlantic's overearnings for the 1987-1988 monitoring period.[17] Allnet cites no supporting authority or rationale for its suggestion that this Commission lacks the authority to consider a complainant's self-help actions in determining the amount of damages to be awarded in a Section 208 complaint proceeding.[18] Here, where it is clear that Allnet has already withheld funds which are directly related to the damages it would have us order Bell Atlantic to pay, we find it appropriate to adjust Allnet's damages award by the amount previously withheld.[19]

IV. ORDERING CLAUSES

7. Accordingly, IT IS ORDERED, pursuant to Sections 4(i), 4(j), 206-209, and 405 of the Communications Act of 1934, as amended, 47 U.S.C. §§ 154(i), 154(j), 206-209, and 405, that the petition for reconsideration filed by the Bell Atlantic Telephone Companies IS GRANTED.

8. IT IS FURTHER ORDERED that our previous order entered in this proceeding, FCC 93-62, directing the Bell Atlantic Telephone Companies to pay Allnet Communication Services, Inc. monetary damages in the amount of $168,000 IS SET ASIDE to the extent indicated above.

9. IT IS FURTHER ORDERED that the Bell Atlantic Telephone Companies SHALL PAY to Allnet Communication Services, Inc. the sum of $68,000 (Sixty-eight thousand dollars) within 60 days after the release of this Memorandum Opinion and Order.

10. IT IS FURTHER ORDERED that the Bell Atlantic Telephone Companies SHALL PAY interest on the amount of damages assessed, using applicable IRS rates found in Appendix A of the *Damages Order* from January 1, 1989 until the date of full payment to Allnet Communication Services, Inc.

FEDERAL COMMUNICATIONS COMMISSION

William F. Caton
Acting Secretary

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[13] 47 U.S.C. §§ 206, 208, 209, 407.

[14] Allnet Opposition at 2.

[15] *Id.* at 3-4.

[16] Our action here does not alter our determination in the *Damages Order* that Allnet sustained damages in the amount of $168,000 as a consequence of Bell Atlantic's rate of return prescription violations. We find, based on facts presented in this matter, that Allnet, through its self-help actions, has already recouped $100,000 which it attributes to defendants' overcharges for the 1987-1988 monitoring period.

[17] Allnet's claim that the amount was withheld from only the Bell Telephone Company of Pennsylvania and reflected Allnet's contribution to defendants' overearnings for the 1985-1986 monitoring period has no support in the record. Allnet's May 17, 1990 letter makes no reference to overearnings for periods other than the 1987-1988 monitoring period. The letter also unequivocally states that Allnet is making the adjustment to "secure the money that Bell Atlantic has admitted owing Allnet" and makes no mention of the Bell Telephone Company of Pennsylvania separately or individually.

[18] We note that the Communications Act imposes a requirement on all carriers to collect their lawful tariffed charges. 47 U.S.C. § 203(c). The Commission does not encourage parties to resort to "self-help" or attempts to withhold payment of such charges based on claims that the charges violate the Act or the Commission's rules. Rather, the proper recourse is to pay the charges and submit the matter to the appropriate forum for resolution. Where a complainant prevails in such an action, it would be entitled to recover the unlawful charges as well as consequential damages and interest.

[19] Because we find that an adjustment to Allnet's damages award is appropriate under the facts of this case, we need not and do not reach Allnet's claim that a Section 407 court action is an appropriate forum to address Bell Atlantic's adjustment claims.

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of:

MMDS, INCORPORATED File No. 2497-CM-P-83

Conditional Licensee of Multichannel
Multipoint Distribution Service
Station WHT709, Birmingham, Alabama

ORDER ON RECONSIDERATION

Adopted: July 30, 1993; Released: August 9, 1993

By the Chief, Domestic Facilities Division:

1. *Introduction.* MMDS, Incorporated (MMDS, Inc.) filed a petition for reinstatement of its conditional license to operate Multichannel Multipoint Distribution Service (MMDS) Station WHT709 on the E-group channels in Birmingham, Alabama. The Commission granted MMDS, Inc. a conditional license on May 14, 1992. The license was conditioned, in part, on the applicant providing "[a]n analysis demonstrating a lack of harmful interference for each ITFS licensee or construction permittee with a transmitter site within 50 miles of the proposed MMDS transmitter site, together with a request for declaratory ruling" prior to commencement of construction. In the alternative, MMDS, Inc. could provide a consent statement by any ITFS licensee or permittee within 50 miles of the proposed transmitter site. The conditional license stated, with regard to these requirements, that "[f]ailure to comply exactly and completely with the . . . conditions will result in automatic forfeiture of this authorization on Aug 16, 1992." MMDS, Inc. did not file the required non-interference analysis nor a petition for declaratory ruling by August 15, 1992, the required filing deadline. Moreover, no consent statement was filed. Finally, MMDS, Inc. did not seek an extension of time to file the required documentation. Accordingly, MMDS, Inc.'s authorization was listed as forfeited on a public notice dated October 28, 1992.

2. *Background.* The Birmingham Board of Education (Board) is a grandfathered ITFS licensee on the E-group channels in Birmingham. There is no other co-channel ITFS entity and no adjacent channel ITFS applicant, construction permittee, or licensee within 50 miles of MMDS, Inc.'s proposed transmitter site. The Board opposes grant of MMDS, Inc.'s petition for reinstatement of its conditional license. The Board argues that MMDS, Inc. did not comply with the express terms and conditions of its license.

3. MMDS, Inc., has been attempting to obtain the Board's agreement to migrate from the E-group channels to alternative spectrum for many years, without success. The record reveals that at one time, MMDS, Inc. contemplated finding a new site at which it could co-locate with the F-group channels tentative selectee while avoiding interference with the Board's operations on the E-group channels. The partial interference analysis submitted in support of its proposal indicated that "it would be necessary to upgrade several of the receive antennas currently used" by the Board in order to avoid harmful co-channel interference. Letter from David M. Silverman to William J. Tricarico, April 8, 1986, page 2, and enclosure, Comsearch, Inc. Engineering Statement.

4. In its petition for reconsideration, MMDS, Inc., argues that the Commission disregarded documents responsive to interference concerns which it filed on August 14, 1992. Those documents included a "Statement Concerning Co-Channel ITFS Interference." The statement indicated that MMDS, Inc. was making a "diligent and on-going effort to negotiate an amicable resolution of the problem whereby the Board of Education would either vacate the facilities ... or . . . consolidate its operations with other ITFS operators in the area." The statement acknowledges that the "omni-directional operation of the ITFS station and the MMDS station would result in mutually destructive interference." MMDS, Inc. further states, without support, that "it had a year from the date of the conditional license in which to either obtain the Board's concurrence to voluntarily migrate from the frequencies or to initiate the involuntary migration provisions of the rules. . .". (Supplement to Petition for Reconsideration).

5. *Discussion.* We disagree with MMDS, Inc. The authorization issued to MMDS, Inc. expressly stated that an interference study demonstrating a lack of harmful interference to ITFS licenses and construction permittees, *and* a petition for declaratory ruling must be filed by a specified date. MMDS, Inc. failed to comply with those conditions, or to file a modification application requesting change of the due date for filing this documentation. Consequently, the license was automatically forfeited. MMDS, Inc. accepted the construction authorization, and by doing so agreed to be subject to the stated conditions. The consequence of failing to comply with the conditions -- automatic forfeiture of the authorization -- is clearly set forth on the face of the authorization. *See Miami MDS Company*, 7 FCC Rcd 4347 (1992); *See also Vidcom Marketing, Inc.*, 6 FCC Rcd (1991).

6. MMDS, Inc.'s argument that it had one year from the date of the authorization to obtain the Board's consent to migrate from the channels or to institute involuntary migration procedures against the Board is based on this Division's decision in *Communications Tech Management of Texas, Inc.*, 7 FCC Rcd 7256 (Dom. Fac. Div. 1992). There, the Division enunciated the requirements with regard to protecting co-channel and adjacent channel ITFS licensees and permittees. An MMDS conditional licensee who filed its initial application in 1983 must, prior to construction, provide an analysis which demonstrates a lack of harmful interference to registered receive sites of grandfathered ITFS stations within 50 miles of its proposed transmitter site (and serve a copy of the interference analysis on each affected ITFS entity), *or* it must file a consent statement from affected ITFS licensees or permittees, *or* it must "submit the appropriate modification application for the ITFS entity." *Id.* at 7257. MMDS, Inc. apparently construes the latter option as *carte blanche* to displace involuntarily any ITFS licensee. This is not the case. Section 74.986 of the Commission's rules authorizes involuntary equipment and transmitter location changes by an MMDS entity against an ITFS licensee. The involuntary migration rule, Section 74.902(h), applies only to ITFS stations on the E and F channels operating in a point-to-point mode. The Board operates in an omni-directional mode, and hence, is not eligible for the involuntary migration provisions of the rules. MMDS, Inc. presents no argument that it initiated an

equipment or location modification procedure pursuant to Section 74.986, or that its proposed modification eliminates the potential for harmful interference to the Board's ITFS station from the MMDS, Inc. proposed station. Also, MMDS, Inc. cites no authority for its assertion that it had twelve months to resolve ITFS problems, and that there was no ITFS petition to deny procedure.

7. *Conclusion.* MMDS, Inc. has not persuasively demonstrated that reinstatement of its conditional license is in the public interest. Petitioner failed to return the authorization upon receipt, with a reconsideration request of our imposition of the referenced express condition. Petitioner accepted the authorization with its conditions requiring timely submission of documentation by a specified date and prior to construction of the facility, as well as the automatic forfeiture consequence of its failure to so comply. Accordingly, IT IS ORDERED that the petition for reconsideration and supplement thereto filed by MMDS, Inc., regarding the captioned conditional license IS DENIED. This order is issued pursuant to 47 C.F.R. §0.291, and is effective on its release date. *See* 47 C.F.R. §§1.4(b), 1.106, and 1.115.

FEDERAL COMMUNICATIONS COMMISSION

James R. Keegan
Chief, Domestic Facilities Division
Common Carrier Bureau

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of the Authorization of

Edna Cornaggia File No. 50301-CM-MP-88

For Multichannel Multipoint Distribution Service station WDU403 on the E-group channels at Chicago, Illinois

ORDER ON RECONSIDERATION

Adopted: August 2, 1993; Released: August 9, 1993

By the Chief, Domestic Facilities Division:

1. *Introduction.* Edna Cornaggia (Cornaggia) filed a petition for reconsideration of the dismissal by the Domestic Facilities Division (Division) on delegated authority of her modification application, and requested reinstatement of the above-referenced conditional license for Multichannel Multipoint Distribution Service (MMDS) station WDU403 on the E-group channels at Chicago, Illinois.

2. *Background.* Upon grant of the initial application for this station (File No. 3528-CM-P-83), the conditional license stipulated a specified construction completion date, which was twelve (12) months after the date of grant. Approximately 188 days prior to the expiration of this construction period, Cornaggia filed a modification application (File No. 50301-CM-MP-88) proposing a change of transmitter location. Although Cornaggia was required under Section 21.902(c) to file, on the same day she filed her modification application, an interference analysis for the authorized MMDS station WLK385 of VisionAire, Inc. at Kankakee, Illinois, the interference analysis was filed 140 days later, and was filed without a certificate of service for VisionAire. After review of this analysis, the Division determined that Cornaggia's MMDS station WDU403 at the newly-proposed site would cause harmful interference to the Kankakee station. Therefore, the modification application was dismissed for failure to comply with the interference protection requirements of 47 C.F.R. Sec. 21.902(b)(3) and for failure to comply with the service requirements of 47 C.F.R. Sec. 21.902(g).[1]

3. On reconsideration, Cornaggia argues that protection should not be a consideration given that, at the time of reconsideration, VisionAire's Kankakee authorization had been forfeited. Cornaggia also notes that the Kankakee authorization was forfeited after Cornaggia forfeited her authorization. Cornaggia Petition at 3-4. In her petition, Cornaggia discusses the harmful interference to be received by the Kankakee station. She submitted duplicate copies of some pages from the interference analysis for the Kankakee station previously submitted and some new pages describing the harmful interference to the Kankakee station from three additional sites, proposing to serve Gary. Cornaggia also asserts that because she changed from two back-to-back cardioid transmitting antenna, for which there could be no cross-polarization by the Kankakee station, to one vertically-polarized transmitting antenna, VisionAire should be required to file a modification application to change its antenna to a horizontally-polarized antenna. Cornaggia further argues that she considered for her modification application a total of six transmitter sites in Gary, studying four of the six sites, and that all four Gary sites would cause harmful interference to VisionAire's station. "Accordingly, the Commission should find that the public interest in serving Gary" warrants a waiver of the Commission's technical interference protection standards because it is more important to serve Gary than Kankakee. Cornaggia Petition at 7. In addition, she asserts that the failure to serve Visionaire was harmless error because VisionAire's authorization was forfeited subsequently and because VisionAire does not intend to build its station. Cornaggia Petition at 3-4.

4. In opposition to this petition for reconsideration,[2] VisionAire notes that "Cornaggia admits that the proposed [station at the new transmitter site] will cause interference to VisionAire's proposed Kankakee station." VisionAire's Opposition at 1. VisionAire also states that "Cornaggia is asking the FCC to ignore the interest of the citizens of Kankakee because she has not yet found an interference-free site to serve Gary/Chicago." *Id.* Contrary to 80 Cornaggia's assertion that VisionAire does not intend to build its Kankakee station, VisionAire argues that it has taken substantial steps to build its Kankakee station. "In any case it is irrelevant to the question of interference to the Kankakee market." *Id.* at n.2. VisionAire states that its Kankakee station is entitled to interference protection. VisionAire also asserts Cornaggia failed to contact VisionAire for purposes of resolving the interference problems as required by Section 21.902(a). VisionAire's Opposition at 2.

5. *Discussion.* Although acknowledging that the interference analysis she filed demonstrates that her proposal would cause harmful interference to the Kankakee station, Cornaggia argues, in effect, that no analysis needed to be filed for a station authorized on the date that her application was filed, and that the Division staff should not use the filing date of her modification application in processing her application.

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[1] Section 21.902(b)(3) provides:

> As a condition for use of frequency in this service, each applicant, permittee and licensee is required to: ... Engineer the system to provide at least 45 dB of cochannel interference protection within the protected service areas of all other authorized or previously proposed stations that transmit, or may transmit, signals for standard television reception.

Section 21.902(g) provides:

> All interference studies submitted pursuant to paragraph (c) of this section shall be served on all licensees and permittees of, and applicants for the stations considered in such studies. This service shall occur on or before the date of submission and a list of all parties so served shall be submitted with the study.

[2] VisionAire also filed an opposition to a second modification application filed by Cornaggia on the same day as her reconsideration petition.

6. We disagree. By stating that each required interference analysis must be included with the application when it is initially filed, Section 21.902(c) clearly establishes that the relevant date is the application's date of filing. This filing date is used in deciding whether a station is authorized. If the station is authorized on that filing date, then Cornaggia was required to file an interference analysis as to that station. If the rule requires an analysis be filed, then Division staff considers "the potential for harmful co-channel interference."[3] Section 21.902(c) can only be interpreted as requiring interference protection for stations authorized on the date Cornaggia's modification application was filed. As the Commission recently stated:

> The Bureau's long-standing choice of the date of filing for this evaluation provides a standard that is known, certain, and fair to all interested parties. [The applicant's] proposed alternative -- the date of Commission action -- varies from application to application, depending on staff resources, application backlogs, and other administrative considerations. To assess applicant rights and obligations under so variable a standard would indeed be arbitrary and capricious, with decisions made primarily on the basis of chance.[4] The date of filing, in contrast, is fixed at the outset and can be applied to all applicants on equal terms.[5] Its use is well within the broad discretion permitted agencies in the ordering of their processes. *See, e.g., Ranger v. FCC*, §294 F.2d 240 (D.C. Cir. 1961).

Roundtree Communications, 7 FCC Rcd 5456 (1992)(footnotes in original). Pursuant to Section 21.902(c), Cornaggia had a duty of interference protection to the Kankakee station because the Kankakee station was an authorized station on the day Cornaggia filed her modification application. Thus, the Division's finding in this regard was proper.

7. The next issue to be considered is whether a modification application which demonstrates harmful interference to an authorized station should be granted. Section 21.40(a) of the Commission's Rules provides, *inter alia,*: "[N]o modification of a license ... shall be made except upon ... finding by the Commission that: (1) Such modification will promote the public interest, convenience and necessity, or (2) That the provisions of the Communications Act of 1934 ... will be more fully complied with if such application is granted." One component of the public interest determination is interference protection. The importance of interference protection to authorized and previously-proposed stations was emphasized by the Commission in 1987.

> In all of the services governed by Part 21, each carrier has the responsibility to engineer its proposals to avoid conflicts with other carriers. Typically, this process involves an interference study or analysis for the areas in which the carrier plans to operate. In ... the Multipoint Distribution Service (MDS), applicants are required to include an interference study with each application and serve a copy of the analysis on affected licensees, permittees and applicants of previously-filed applications, *see* 47 C.F.R. Secs. 21.504, 21.902. Oppositions may be filed with the Commission, which then oversees resolution of any conflicts.

Revision of Part 21 of The Commission's Rules, 2 FCC Rcd 5713, 5713-14 (1987). After repeating much of this description a few pages later in this same rulemaking order, the Commission provided further detail.

> MDS ... applicants ... are to analyze the interference potential on previously authorized and proposed adjacent and co-channel users located within 50 miles of the applicants' proposed stations. MDS applicants are to serve a copy of their interference analyses on affected parties on or before filing them with the Commission....
>
> ...
>
> Coordination of MDS ... systems ... relies on accurate data about the interference environment. ... [W]e are making no changes to the requirement that MDS ... applicants coordinate their proposals with licensees, permittees and applicants of previously filed applications.

Id. at 5716-17. As to modification applications, the Commission explained that MMDS modifications are more likely to affect the interference environment than modifications in another Part 21 service, such as the Point-to-Point Microwave Service.

> MDS ... stations typically provide primary service to a single large metropolitan area, employ omnidirectional or broadbeam sector-coverage type antennas to cover the primary service area, and may serve areas in close proximity. These factors combine to create an environment wherein MDS ... licensees are particularly susceptible to interference problems when there are significant changes....

Id. at 5723-24. It was stressed that MMDS stations would be more susceptible to increased interference resulting from modifications to MMDS stations nearby. Repeated several times throughout this discussion is the declaration that it is necessary to protect other licensees from potential interference. In contrast, Cornaggia cites no authority to support her argument that there was no duty to protect a nearby cochannel MDS station and cites no precedents for a finding that it is in the public interest to grant an MDS modification application which demonstrates the modification would cause harmful interference to an authorized

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[3] Section 21.902(e) establishes the circumstances in which there is no duty to protect from harmful interference. The Kankakee station does not fit within the categories enumerated in this section. In this instance, Cornaggia must protect the Kankakee station from harmful interference.

[4] Such a standard might also tempt applicants to expedite, delay or otherwise interfere with the orderly conduct of our business, in an effort to obtain action at some moment they deemed advantageous to their interests. Disruption of this nature is clearly contrary to the public interest.

[5] To the extent that applicants may select their date of filing, they retain some influence over the standards under which their proposals are evaluated.

MDS station. In order to obtain a public interest finding, Cornaggia was required to file initially with its modification application an analysis demonstrating a lack of harmful interference to the Kankakee station. *See* 47 C.F.R. Secs. 21.40 and 21.902.[6] Cornaggia failed to do so.

8. The Commission makes provision for actual notice and an opportunity to be heard by parties in interest by requiring at Section 21.902(g) that microwave stations that might be affected by operation of an MDS station be served a copy of the required interference analysis for their station. Cornaggia admittedly failed to properly serve VisionAire with a copy of the interference analysis, which demonstrates harmful interference to VisionAire's authorized Kankakee station. Due to this lack of service, the orderly process contemplated in the Commission's rulemaking order, in which Commission staff resolves interference problems after oppositions are filed, was negated. *Revision of Part 21 of The Commission's Rules,* 2 FCC Rcd 5713, 5713-14 (1987). Thus, the modification application was defective for failure to comply with the requirements of Section 21.902(g).

9. *Conclusion and Ordering Clause.* Having carefully considered all of the arguments and evidence presented, we find that, for the deficiencies in the modification application, lack of required service, and the potential for harmful interference to an authorized station, the above-referenced modification application was properly dismissed, reconsideration of the dismissal is not warranted, and reinstatement of the authorization is not justified.[7] Accordingly, IT IS ORDERED that the reconsideration petition filed by Edna Cornaggia regarding the above-referenced MMDS modification application and authorization IS DENIED. This order is issued pursuant to 47 C.F.R. Sec. 0.291, and is effective on its release date. *See* 47 C.F.R. Secs. 1.4(b), 1.106, and 1.115.

FEDERAL COMMUNICATIONS COMMISSION

James R. Keegan
Chief, Domestic Facilities Division
Common Carrier Bureau

[6] Contrary to the assertion in the reconsideration petition that the Gary site proposed in her modification application is the only possible site for this MMDS station, the four transmitter sites Cornaggia studied prior to filing the modification application and the three transmitter sites described in the reconsideration petition, do not exhaust the numerous potential transmitter sites in the Chicago Consolidated Metropolitan Statistical Area (CMSA) and its 15-mile buffer zone. *See* 47 C.F.R. Sec. 21.901(d)(5).

[7] Cornaggia asks that, if her modification application is not reinstated in our consideration of her reconsideration petition, in the alternative, her modification application, as amended by the petition for reconsideration, be treated as newly-filed. However, it is no longer possible to amend an application which has already been dismissed, as Cornaggia's modification was dismissed. Therefore, we will not treat Cornaggia's modification application, File No. 50301-CM-MP-88, as newly-filed. We note that Cornaggia filed a second modification application, File 50059-CM-MP-89, after the forfeiture of her conditional license. However, it is no longer possible to modify an authorization which has been forfeited. Typically, modification applications filed after forfeiture are returned as unacceptable for filing or are dismissed. Because it was filed after forfeiture, in light of VisionAire's request for alternative treatment in its reconsideration petition, we will treat this second application as an initial application, and not as a modification application. The application file number will be changed from 50059-CM-MP-89 to 50059-CM-P-89.

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

INTERNATIONAL TELECHARGE, INC.,
Complainant,

v. File No. E-92-65

THE SOUTHERN NEW ENGLAND
TELEPHONE COMPANY,
Defendant.

ORDER

Adopted: July 30, 1993; Released: August 9, 1993

By the Chief, Formal Complainants and Investigations Branch, Enforcement Division, Common Carrier Bureau:

1. On May 4, 1992, International Telecharge, Inc. (ITI), filed the above-captioned formal complaint against The Southern New England Telephone Company (SNET) seeking to recover damages from SNET for alleged violations of the Commission rules in connection with SNET's computation and assessment of terminating carrier common line ("CCL") charges. On July 26, 1993, ITI and SNET filed a joint motion to dismiss the complaint stating that the parties have negotiated a mutually agreeable settlement of all pending controversies.

2. We are satisfied that dismissal of the complaint will serve the public interest by eliminating the need for further litigation and the expenditure of further time and resources of the parties and of this Commission.

3. Accordingly, IT IS ORDERED, pursuant to Section 4(i) of the Communications Act of 1934, as amended, 47 U.S.C. § 154(i), and authority delegated under Section 0.291 of the Commission's rules, 47 C.F.R. § 0.291, that the parties' Joint Motion to Dismiss Complaint IS GRANTED.

4. IT IS FURTHER ORDERED that the above-captioned complaint IS DISMISSED WITH PREJUDICE and that the proceeding IS TERMINATED.

FEDERAL COMMUNICATIONS COMMISSION

Thomas D. Wyatt
Chief, Formal Complaints
and Investigations Branch
Enforcement Division
Common Carrier Bureau

Before the
Federal Communications Commission
Washington, D.C. 20554

PR Docket No. 93-149

In the Matter of

Idaho Public Safety Plan

ORDER

Adopted: August 3, 1993; Released: August 9, 1993

By the Chief, Private Radio Bureau and the Chief Engineer:

1. On January 28, 1993, Region 12 (Idaho) submitted its Public Safety Plan to the Commission for review. The Plan sets forth the guidelines to be followed in allotting spectrum to meet current and future mobile communications requirements of the public safety and special emergency entities operating in Idaho. On April 20, 1993, Idaho filed revisions to the Plan, based on conversations with the Commission's staff.

2. The Idaho Plan was placed on Public Notice for comments due on July 7, 1993, 58 FR 32133 (June 8, 1993). The Commission received no comments in this proceeding.

3. We have reviewed the Plan submitted for Idaho and find that it conforms with the National Public Safety Plan. The plan includes all the necessary elements specified in the *Report and Order* in Gen. Docket No. 87-112, 3 FCC Rcd 905 (1987), and satisfactorily provides for the current and projected mobile communications requirements of the public safety and special emergency entities in Idaho.

4. Therefore, we accept the Idaho Public Safety Radio Plan. Furthermore, licensing of the 821-824/866-869 MHz band in Idaho may commence immediately.

FEDERAL COMMUNICATIONS COMMISSION

Ralph A. Haller
Chief, Private Radio Bureau

Thomas P. Stanley
Chief Engineer

Before the
Federal Communications Commission
Washington, D.C. 20554

PR Docket No. 93-150

In the Matter of

North Carolina Public Safety Plan

ORDER

Adopted: August 3, 1993; Released: August 9, 1993

By the Chief, Private Radio Bureau and the Chief Engineer:

1. On May 13, 1992, Region 31 (North Carolina) submitted its Public Safety Plan to the Commission for review. The Plan sets forth the guidelines to be followed in allotting spectrum to meet current and future mobile communications requirements of the public safety and special emergency entities operating in Kansas. On April 16, 1993, North Carolina filed revisions to the Plan, based on conversations with the Commission's staff.

2. The North Carolina Plan was placed on Public Notice for comments due on July 7, 1993, 58 FR 32134 (June 8, 1993). The Commission received no comments in this proceeding.

3. We have reviewed the Plan submitted for North Carolina and find that it conforms with the National Public Safety Plan. The plan includes all the necessary elements specified in the *Report and Order* in Gen. Docket No. 87-112, 3 FCC Rcd 905 (1987), and satisfactorily provides for the current and projected mobile communications requirements of the public safety and special emergency entities in North Carolina.

4. Therefore, we accept the North Carolina Public Safety Radio Plan. Furthermore, licensing of the 821-824/866-869 MHz band in North Carolina may commence immediately.

FEDERAL COMMUNICATIONS COMMISSION

Ralph A. Haller
Chief, Private Radio Bureau

Thomas P. Stanley
Chief Engineer

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

KEYSTONE COMMUNICATIONS, L.P. File No. I-T-C-93-181

For Authority Pursuant to Section 214 of the Communications Act of 1934, to Establish Channels of Communication between the U.S. and INTELSAT Atlantic and Pacific Ocean Region Satellites for the Provision of INTELSAT Business Service and Related Digital Video Service.

ORDER AND AUTHORIZATION

Adopted: July 17, 1993; Released: August 9, 1993

By the Chief, International Facilities Division:

1. Upon consideration of the above-captioned uncontested application, filed pursuant to Section 214 of the Communications Act of 1934, as amended, we find that the present and future public convenience and necessity require the provision of INTELSAT Business services (IBS) and related digital video service by Keystone Communications, L.P. (Keystone).

2. Accordingly, IT IS ORDERED that application File No. I-T-C-93-181 IS GRANTED, and Keystone is authorized to establish channels of communications between appropriately licensed earth stations in the U.S. and INTELSAT Atlantic Ocean Region (AOR) and Pacific Ocean Region (POR) satellites for the provision of IBS and related digital video service between the U.S. and the countries listed in Comsat's Tariff F.C.C. No. 103 for the IBS and related digital video service space segment.

3. IT IS FURTHER ORDERED that the authority granted herein for Keystone to establish channels of communication between the earth stations in the U.S. and the INTELSAT satellites does not dispense with the requirement that all such earth stations shall be authorized under Title III of the Communications Act of 1934, as amended, to communicate with those satellites.

4. IT IS FURTHER ORDERED that our authorization for Keystone to provide private lines as part of the services authorized herein is limited to the provision of such private lines only between the U.S. and those countries listed in Comsat's Tariff F.C.C. No. 103 respectively -- that is, private lines which originate in the U.S. and terminate in those countries or which originate in those countries and terminate in the U.S. In addition, Keystone may not – and Keystone's tariff must state that Keystone's customers may not -- connect private lines provided over these facilities to the public switched network at either the U.S. or foreign end, or both, for the provision of international basic telecommunications service, including switched voice services, unless authorized to do so by the Commission upon a finding that its correspondents afford resale opportunities equivalent to those available under U.S. law, in accordance with *Regulation of International Accounting Rates, Phase II, First Report and Order*, 7 FCC Rcd 559 (1991), *Order on Reconsideration and Third Further NPRM*, 7 FCC Rcd 7927 (1992), *petition for reconsideration pending.*

5. IT IS FURTHER ORDERED that the applicant shall file a tariff pursuant to Section 203 of the Communications Act, 47 U.S.C. Section 203, and Part 61 of the Commission's Rules, 47 C.F.R. Part 61, for the services authorized in this Order.

6. IT IS FURTHER ORDERED that the applicant shall file the annual reports of overseas telecommunications traffic required by Section 43.61 of the Commission's Rules, 47 C.F.R. §43.61.

7. IT IS FURTHER ORDERED that neither the applicant nor any persons or companies controlling it or controlled by it shall acquire or enjoy any right, for the purposes of handling or interchanging traffic to or from the United States, its territories or possessions, which is denied to any other United States carrier by reason of any concession, contract, understanding, or working arrangement to which the applicant or any persons or companies controlling it or controlled by it are parties.

8. IT IS FURTHER ORDERED that the applicant shall file semi-annual circuit reports pursuant to Section 63.15(b) of the Commission's Rules, 47 C.F.R. §63.15(b), for any circuits acquired on the INTELSAT satellite system.

9. IT IS FURTHER ORDERED that the applicant shall file copies of any operating agreement it enters into with foreign correspondents with the Commission within 30 days of its execution, and shall otherwise comply with the filing requirements contained in Section 43.51 of the Commission's Rules, 47 C.F.R. §43.51.

10. This authorization is not to be construed as permitting the provision of any services between earth stations located within the U.S.

11. This order is issued under Section 0.291 of the Commission's rules and is effective upon adoption. Petitions for reconsideration under Section 1.106 or applications for review under Section 1.115 of the Commission's rules may be filed within 30 days of this Order's public notice date (*See* Section 1.4(b)(2)).

FEDERAL COMMUNICATIONS COMMISSION

George S. Li
Chief, International Facilities Division
Common Carrier Bureau

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

RCI Network Services, Inc. File No. I-T-C-93-186

Application for Authority Pursuant to Section 214 of the Communications Act, as Amended to Construct and Operate Point-to-Point Microwave Facilities to Provide Common Carrier Service Between the United States and Canada

ORDER AND AUTHORIZATION

Adopted: July 19, 1993; Released: August 9, 1993

By the Chief, International Facilities Division:

1. Upon consideration of the above-captioned uncontested application, filed by RCI Network Services, Inc. (RCI) pursuant to Section 214 of the Communications Act of 1934, as amended, we find that the present and future public convenience and necessity require its grant.

2. Accordingly, IT IS ORDERED that application File No. I-T-C-93-186 IS GRANTED and RCI is authorized to operate 8 T-1 circuits to provide switched and private line services between the United States and Canada via point-to-point microwave facilities.

3. IT IS FURTHER ORDERED that the authority granted herein to establish channels of communication between microwave stations at Buffalo, New York and Ft. Erie, Ontario, Canada for the authorized services herein does not dispense with the requirement that the U.S. microwave stations shall be authorized under Title III of the Communications Act.[1]

4. IT IS FURTHER ORDERED that neither RCI nor any persons or companies directly or indirectly controlling it or controlled by it, or under direct or indirect common control with it, shall acquire or enjoy any right, for the purposes of handling or interchanging traffic to or from the United States, its territories or possessions, which is denied to any other United States carrier by reason of any concession, contract, understanding, or working arrangement to which RCI or any person or companies controlling or controlled by RCI are parties.

5. IT IS FURTHER ORDERED that RCI shall file copies of any operating agreements, including the applicable accounting rate, entered into with its correspondents within 30 days of their execution, and shall otherwise comply with the filing requirements contained in Section 43.51 of the Commission's Rules, 47 C.F.R. §43.51.

6. IT IS FURTHER ORDERED that our authorization of RCI to provide private lines is limited to the provision of such private lines only between the United States and Canada -- that is, private lines which originate in the United States and terminate in Canada or originate in Canada and terminate in the United States. In addition, RCI may not -- and RCI's tariffs must state that RCI's customers may not -- connect private lines provided over these facilities to the public switched network at either the U.S. or the Canadian end, or both, for the provision of international basic telecommunications services, including switched voice services, unless authorized to do so by the Commission upon a finding that Canada affords resale opportunities equivalent to those available under U.S. law, in accordance with *Regulation of International Accounting Rates*, Phase II, First Report and Order, 7 FCC Rcd 559 (1991), *Order on Reconsideration and Third Further Notice of Proposed Rulemaking* (*Third Further Notice*), 7 FCC Rcd 7927 (1992), *fONOROLA Corporation and EMI Communications Corporation* (*fONOROLA/EMI Order*), 7 FCC Rcd 7312 (1992), *petition for reconsideration pending.*

7. IT IS FURTHER ORDERED that this Order may be subject to future modification pursuant to the outcome of the *Third Further Notice, fONOROLA/EMI Order, petition for reconsideration pending*, and any related proceedings.

8. IT IS FURTHER ORDERED that RCI shall file tariff provisions pursuant to Section 203 of the Communications Act of 1934, 47 U.S.C. §203, and Part 61 of the Commission's Rules, 47 C.F.R. Part 61, for the services authorized herein.

9. IT IS FURTHER ORDERED that RCI shall file the annual reports of overseas telecommunications traffic required by Section 43.61 of the Communications Act, 47 C.F.R. §43.61.

10. IT IS FURTHER ORDERED that RCI shall file semi-annual reports of circuit additions to Canada, pursuant to Section 63.15 of our Rules, 47 C.F.R. §63.15.

11. IT IS FURTHER ORDERED that RCI shall file a copy of any operating agreements entered into with foreign correspondents with the Commission within 30 days of their execution and shall otherwise comply with the filing requirements contained in Section 43.51 of the Commission's Rules, 47 C.F.R. §43.51, and in *Regulation of International Accounting Rates*, Phase II, First Report and Order, 57 Fed. Reg. 646 (1992)(codified at 47 C.F.R. §43.51(a)(3)).

12. IT IS FURTHER ORDERED that RCI shall file all arrangements for private line interconnection to the U.S. public switched network, pursuant to Section 43.51(a) of our Rules, 47 C.F.R. §43.51(a).

13. IT IS FURTHER ORDERED that nothing in this authorization should be construed to include authorization for the transmission of money in connection with the services RCI seeks authority to provide. The transmission of money is not considered to be a common carrier service. Therefore, nothing in this Order should be construed as containing authority for the transmission of money.

[1] RCI has pending an application Form 494, filed May 5, 1993, for the requisite Title III authorization to construct its domestic point-to-point microwave station. *See* File No. 041-72-CF-P-93.

14. This order is issued pursuant to Section 0.291 of the Commission's Rules and is effective upon adoption. Petitions for reconsideration under Section 1.106 or applications for review under Section 1.115 of the Commission's Rules may be filed within 30 days of the date of public notice of this order (*See* Section 1.4(b)(2)).

FEDERAL COMMUNICATIONS COMMISSION

George S. Li
Chief, International Facilities Division
Common Carrier Bureau

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

American Telephone and Telegraph Company — File No. I-T-C-93-189

Application for Authorization Under Section 214 of the Communications Act of 1934, as Amended, to Acquire and Operate Additional Capacity in the Denmark-Germany 1 Cable System for the Provision of Its Authorized Services Between Points In or Reached Via the United States and Denmark, Norway and Poland

ORDER AND AUTHORIZATION

Adopted: July 25, 1993; Released: August 9, 1993

By the Chief, International Facilities Division:

1. Upon consideration of the above-captioned uncontested application, filed by American Telephone and Telegraph Company (AT&T) pursuant to Section 214 of the Communications Act of 1934, as amended, we find that the present and future public convenience and necessity require its grant.

2. Accordingly, IT IS ORDERED that application File No. I-T-C-91-189 IS GRANTED and AT&T is authorized to:

a. acquire and operate half-interests in 8 Minimum Investment Units (MIUs)[1] of capacity in the Denmark-Germany 1 cable system (DK-GER 1)[2] to extend TAT-9 and TAT-10 cable systems capacity to Denmark (1 MIU), Norway (2 MIUs), and Poland (5 MIUs);

b. lease appropriate extension facilities; and

c. activate capacity in the DK-GER 1 cable system and the aforementioned extension facilities for the provision of its authorized telecommunications services to its certificated points.

3. IT IS FURTHER ORDERED that our authorization of AT&T to provide private lines as part of its authorized services is limited to the provision of such private lines only between the United States and its certificated points, that is, private lines which originate in the United States and terminate in certificated points or which originate in certificated points and terminate in the United States. In addition, AT&T may not -- and AT&T's tariff must state that AT&T's customers may not -- connect private lines provided over these facilities to the public switched network at either the U.S. or foreign end, or both, for the provision of international basic communications services, including switched voice services, unless authorized to do so by the Commission upon a finding that the foreign administration affords resale opportunities equivalent to those available under U.S. law, in accordance with *Regulation of International Accounting Rates, Phase II, First Report and Order*, 7 FCC Rcd 559 (1991), *Order on Reconsideration and Third Further Notice of Proposed Rulemaking*, 7 FCC Rcd 7927 (1992), *petition for reconsideration pending.*

4. This order is issued pursuant to Section 0.291 of the Commission's Rules and is effective upon adoption. Petitions for reconsideration under Section 1.106 or applications for review under Section 1.115 of the Commission's Rules may be filed within 30 days of the date of public notice of this order (*See* Section 1.4(b)(2)).

FEDERAL COMMUNICATIONS COMMISSION

George S. Li
Chief, International Facilities Division
Common Carrier Bureau

[1] A MIU is defined as a nominal 2.048 Mbit/s digital bit stream (2 Mbits/s) and consists of two half interests which are intended for use between two correspondents respectively for joint working. AT&T will pay a sum of approximately $102,400, not including interest during construction, for 8 half-MIUs.

[2] The DK-GER 1 cable system is a digital fiber optic submarine cable system which directly links Denmark and the Federal Republic of Germany.

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

American Telephone and Telegraph Company — File No. I-T-C-93-190

Application for Authorization under Section 214 of the Communications Act of 1934, as Amended, to Acquire and Operate Additional Capacity in (a) second Southeast Asia-Mediterranean-Western Europe Cable System and (b) the United Kingdom-Belgian 6 Cable System for the Provision of Its Authorized Services Between Points In or Reached Via the United States and Various Countries

ORDER AND AUTHORIZATION

Adopted: July 25, 1993; **Released: August 9, 1993**

By the Chief, International Facilities Division:

1. Upon consideration of the above-captioned uncontested application, filed by American Telephone and Telegraph Company (AT&T) pursuant to Section 214 of the Communications Act of 1934, as amended, we find that the present and future public convenience and necessity require its grant.

2. Accordingly, IT IS ORDERED that application File No. I-T-C-93-190 is GRANTED and AT&T is authorized to:

a. acquire and operate 120 jointly assigned Minimum Assignable Units of Ownership (MAUOs)[1] of capacity in a digital submarine cable system, the second Southeast Asia-Mediterranean-Western Europe cable system (SEA-ME-WE 2)[2] to extend capacity to Indonesia (90 MAUOs) and Tunisia (30 MAUOs);

b. acquire and operate whole interests in 60 MAUOs of capacity in the SEA-ME-WE 2;

c. convey half-interests in 60 MAUOs on an Indefeasible Right of User (IRU) basis to BEZEQ (Israel) and operate the matching half-interests;

d. acquire and operate 1 jointly assigned Minimum Investment Unit (MIU)[3] in the United Kingdom-Belgian 6 cable system (UK-BEL 6);[4]

e. lease appropriate extension facilities; and

f. activate capacity in the SEA-ME-WE 2 and UK-BEL 6 cable systems and extension facilities for the provision of its authorized telecommunications services to certificated points.

3. IT IS FURTHER ORDERED that our authorization of AT&T to provide private lines as part of its authorized services is limited to the provision of such private lines only between the United States and its certificated points, that is, private lines which originate in the United States and terminate in certificated points or which originate in certificated points and terminate in the United States. In addition, AT&T may not – and AT&T's tariff must state that AT&T's customers may not – connect private lines provided over these facilities to the public switched network at either the U.S. or foreign end, or both, for the provision of international basic communications services, including switched voice services, unless authorized to do so by the Commission upon a finding that the foreign administration affords resale opportunities equivalent to those available under U.S. law, in accordance with *Regulation of International Accounting Rates, Phase II, First Report and Order*, 7 FCC Rcd 559 (1991), *Order on Reconsideration and Third Further Notice of Proposed Rulemaking*, 7 FCC Rcd 7927 (1992), *petition for reconsideration pending.*

4. This order is issued pursuant to Section 0.291 of the Commission's Rules and is effective upon adoption. Petitions for reconsideration under Section 1.106 or applications for review under Section 1.115 of the Commission's Rules may be filed within 30 days of the date of public notice of this order (*See* Section 1.4(b)(2)).

FEDERAL COMMUNICATIONS COMMISSION

George S. Li
Chief, International Facilities Division
Common Carrier Bureau

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[1] A MAUO is defined as the minimum practical unit of ownership consisting of 73,684.656 Fundamental Units of Ownership consisting of 64,000 usable bits per second and an additional 8,533.333 bits per second required for multiplexing purposes.

[2] The SEA-ME-WE 2 cable system is a digital fiber optic submarine cable system which extends between and among Singapore, Indonesia, Sri Lanka, India, Djibouti, Saudi Arabia, Egypt, Italy, Tunisia, Algeria, France, Cyprus and Turkey. It will link southeast Asia, the Indian subcontinent, the Middle East and western Europe. AT&T will pay a total of approximately $2.42 million for this capacity.

[3] A MIU is defined as a 2.048 Mb/s digital bit stream and consists of two half-interests which are intended for use between two correspondents, respectively.

[4] The UK-BEL 6 cable system is a digital fiber optic submarine cable system which directly links the United Kingdom and Belgium. AT&T will pay approximately $7,500 for this capacity.

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

LDDS Communications, Inc. — File No. ITC-93-199-TC

Application for authority pursuant to Section 214 of the Communications Act of 1934, as amended, for *pro forma* transfer of control of authorizations to resell international switched voice services and to provide direct service between the United States and Iran and private line service to Israel

Com Systems, Inc. — File No. ITC-93-198-TC

and

Resurgens Communications Group, Inc.

Application for authority pursuant to Section 214 of the Communications Act of 1934, as amended, for transfer of control of authorizations to resell international switched voice services and to provide direct service between the United States, the Commonwealth of Independent States, and Canada

MEMORANDUM OPINION, ORDER AND AUTHORIZATION

Adopted: July 30, 1993; Released: August 9, 1993

By the Chief, International Facilities Division:

1. On May 17, 1993, LDDS Communications, Inc. (LDDS), Com Systems, Inc. (CSI), and Resurgens Communications Group, Inc. (Resurgens) filed the above-captioned applications pursuant to Section 214 of the Communications Act of 1934, as amended, and Section 63.01 of the Commission's Rules requesting authority for (1) the *pro forma* transfer of control of the international Section 214 authorizations held by LDDS and its subsidiaries, from LDDS to LDDS-METRO Communications, Inc. (LDDS-METRO); and (2) the transfer of control of the international Section 214 authorizations held by CSI and Resurgens, from Metromedia Company (Metromedia) to LDDS-METRO. Both of the above-captioned applications were placed on public notice on May 19, 1993 and no comments were received.[1]

2. LDDS is a publicly held Tennessee corporation that, through its existing subsidiaries, provides interexchange telephone service to various locations throughout the United States as a nondominant carrier pursuant to the Commission's domestic competitive carrier policies, and resells international switched voice services and provides direct service to Iran and private line service to Israel[2] pursuant to the regulatory requirements established for nondominant international carriers in *International Competitive Carrier Policies*.[3] Furthermore, its subsidiaries provide intrastate service in 42 states, either pursuant to certification, registration or tariff requirements, or on an unregulated basis.

3. Metromedia is a Delaware general partnership that, through its subsidiary Metromedia Communications Corporation (MCC), provides international switched voice services by reselling the switched voice services of other carriers, and on a direct facilities basis to Canada and the

[1] In the May 19, 1993 public notice, CSI's and Resurgens' application (File No. ITC-93-198-TC) was designated as subject to streamlined processing under Section 63.12 of the Commission's Rules. However, upon investigation we have determined that some of the Section 214 authorizations being transferred are authorizations for direct facilities, and therefore do not qualify for streamlined treatment. Therefore, pursuant to Section 1.113 of the Commission's Rules, we hereby clarify the public notice announcing the grant of ITC-93-198-TC, Public Notice Report No. I-6823, dated July 7, 1993, to state that only those authorizations for resale of international switched services (*i.e.* I-T-C-86-022, I-T-C-87-042, and I-T-C-87-069) have been authorized to be transferred. Authority for the transfer of control of the remaining authorizations (*i.e.* I-T-C-86-148, I-T-C-88-045, and I-T-C-88-105) will be granted in this proceeding. We note that this action should not prejudice any interested parties since sufficient public notice of the proposed transfer of control of these authorizations was given, and the transfer of control has yet to occur.

[2] *See* MidAmerican Communications Corporation, File No. I-T-C-91-102-TC, 6 FCC Rcd 4176 (1991); Telamarketing Corporation of Louisiana, File No. I-T-C-90-114-TC, 5 FCC Rcd 7263 (1990); Advantage Companies, Inc., File No. I-T-C-90-008-TC, 5 FCC Rcd 694 (1990); Tele-Fibernet Corporation, File No. 92-177-TC, 7 FCC Rcd 5172 (1992); Prime Long Distance Services, Inc. d/b/a Long Distance for Less, File No. I-T-C-92-040, 7 FCC Rcd 2003 (1992); National Teleservices Company, Inc., File No. I-T-C-91-101, and TRI-J Enterprises, Inc., File No. I-T-C-91-098, 6 FCC Rcd 3605 (1991); American Pioneer Telephone of Texas, Inc., LDDS of Alabama, Inc., LDDS of Arkansas, Inc., LDDS of Indiana, Inc., LDDS of Kansas City, Inc., LDDS of Kentucky, Inc., LDDS-II, Inc., Com-Link 21 Inc., LDDS of Tennessee, Inc., File Nos. I-T-C-90-056-064, 5 FCC Rcd 3230 (1990); AmeriCall Systems of Louisville, File No. I-T-C-90-177, 6 FCC Rcd 241 (1991); First Phone of New England, Inc., File No. I-T-C-89-105, 4 FCC Rcd 5474 (1989); Advanced Telecommunications Corporation, File No. I-T-C-86-099, Mimeo 6047, released July 30, 1986, transferred, File Nos. I-T-C-92-197-AL, I-T-C-92-198-AL, I-T-C-92-203-TC, 7 FCC Rcd 6749 (1992); Directline of Austin, Inc., File No. I-T-C-88-136, Transcall America, Inc., File No. I-T-C-88-135, and Satelco Inc., File No. I-T-C-88-134, 3 FCC Rcd 4348 (1988); Microtel, Inc., File No. I-T-C-86-075, Mimeo No. 4445, released May 13, 1986, transferred, File No. I-T-C-88-123-TC, 3 FCC Rcd 4383 (1988); LDDS Communications, Inc., File No. I-T-C-92-162, 8 FCC Rcd 924 (1993); Dial-Net, Inc., File No. I-T-C-93-059-TC, 8 FCC Rcd 1777 (1993); Touch 1 Long Distance, Inc., File No. I-T-C-93-081-TC, 8 FCC Rcd 1779 (1993); Tri-State Telecommunications Corp. of Texas, 8 FCC Rcd 2672 (1993).

[3] *International Competitive Carrier Policies*, 102 FCC 2d 812 (1985), *recon. denied*, 60 RR 2d 1435 (1986).

Commonwealth of Independent States.[4] Resurgens is a publicly held Georgia corporation that, through its wholly-owned subsidiary CSI, provides international switched voice services by reselling the switched voice services of other carriers.[5] Like LDDS, both Metromedia and Resurgens provide international service under the regulatory requirements established for nondominant international carriers in *International Competitive Carrier Policies.*

4. On May 3, 1993, the Commission authorized the transfer of control of the international Section 214 authorizations held by CSI from Resurgens to Metromedia. On the same date, the Commission also consented to the *pro forma* transfer of control of the authorizations held by MCC to Metromedia.[6] Both of these transfers of control were granted in connection with the proposed merger of MCC with and into Resurgens (the "M/R Merger"), coupled with the acquisition of a controlling equity (approximately 63%) and voting (approximately 93%) stake in Resurgens by Metromedia. Under the merger agreement approved by the Commission, Resurgens, the surviving entity of the M/R Merger, will hold the authorizations previously held by MCC and retain immediate control as a parent company of the authorizations held by CSI.

5. The instant application is submitted in connection with an Agreement and Plan of Merger (the "Agreement") whereby LDDS will merge with and into Resurgens (the "LDDS Merger"). The applicants state that the M/R Merger will occur immediately prior to the LDDS merger since its consummation is a necessary precondition to consummation of the LDDS Merger. Under the proposed terms of the LDDS merger: (1) current holders of LDDS Class A common stock will receive, in exchange for each such share, .9595 shares of newly-issued Common Stock of LDDS-METRO (subject to certain potential adjustments as specified in the Agreement); (2) current holders of LDDS Series B 6.50% Cumulative Senior Perpetual Convertible Preferred Stock will receive, in exchange for each such share, .9595 shares of LDDS-METRO's newly-issued Series 2 Preferred Stock (subject to certain potential adjustments as specified in the Agreement); and (3) Metromedia, who will hold all of Resurgens' Class A Common Stock (which will have been newly-issued by Resurgens in conjunction with the consummation of the M/R Merger) will receive, in exchange for each such share, a number of shares of LDDS-METRO's newly-issued Series 1 Preferred Stock, the amount to be determined in accordance with the formula set forth in the Agreement.[7]

6. In summary, the current stockholders and holders of derivative securities of LDDS collectively will own approximately 68.5% of the fully diluted equity and voting interest in LDDS-METRO. The stockholders of Resurgens (post-merger with MCC) collectively will own approximately 31.5% of the fully diluted equity of and voting interest in LDDS-METRO. Metromedia and John Kluge, Trustee, (holder of a 95% equity interest in Metromedia) will hold 21% of the equity in LDDS-METRO and be its single largest shareholder.

7. In addition, the parties have further agreed that LDDS will be entitled to select seven members of the new ten-member Board of Directors of LDDS-METRO, while Metromedia will be entitled to select the remaining three members of the Board. Bernard J. Ebbers, current President and Chief Executive Officer of LDDS, will continue in those capacities for LDDS-METRO. John Kluge, current chairman of the Board of MCC, will serve as Chairman of the Board of Directors of LDDS-METRO.

8. Following the consummation of the LDDS Merger, the corporate existence of LDDS will terminate and Resurgens will assume the name LDDS-METRO Communications, Inc. LDDS-METRO will then hold the authorizations now held by LDDS, and will be the parent of LDDS' existing subsidiaries. The current subsidiaries of LDDS holding international Section 214 authorizations will operate as subsidiaries of LDDS-METRO. LDDS-METRO, on its own and through subsidiaries, will provide direct services and international resale services to various international points served by underlying facilities-based carriers. LDDS-METRO and its subsidiaries will all operate as nondominant international carriers subject to streamlined regulation.

9. The applicants argue that this transaction will serve the public interest by permitting them to realize significant economic and operational efficiencies. This will make it possible for the applicants to expand their services and become more competitive in the international telecommunications market, while continuing to provide high quality services at affordable rates.

10. In view of the foregoing, we conclude that the transfer of control of the international Section 214 authorizations held by LDDS and its subsidiaries, from LDDS to LDDS-METRO, and the transfer of control of the international Section 214 authorizations held by CSI and Resurgens, from Metromedia to LDDS-METRO, will not adversely affect the public interest. Additionally, we find that the proposed transfer of control of LDDS and its subsidiaries is *pro forma.* This is because the current shareholders of LDDS will hold a 68.5% equity and voting interest in LDDS-METRO, which company will hold and control LDDS' existing authorization, and will control all of LDDS' subsidiaries and their authorizations as a parent company. Thus, ultimate control will remain with the same shareholders, only their control will be as shareholders of LDDS-METRO rather than LDDS.

11. Accordingly, IT IS ORDERED, pursuant to Section 214 of the Communications Act of 1934, as amended, 47 U.S.C. § 214, and Section 63.01 of the Commission's Rules, 47 C.F.R. § 63.01, that the application of LDDS Commu-

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[4] *See Order, Authorization and Certificate,* I-T-C-86-022, Mimeo No. 2074, released January 22, 1986; *Order and Authorization,* I-T-C-86-148, 1 FCC Rcd 584 (1986); *Order, Authorization and Certificate,* I-T-C-88-045, 3 FCC Rcd 822 (1988); and *Order, Authorization and Certificate,* I-T-C-88-105, 3 FCC Rcd 4010 (1988). The Commission granted a *pro forma* transfer of control of these authorizations from MLD Holdings, Inc. to Metromedia. *See* Letter from George Li, Chief, International Facilities Division, to Marvin J. Diamond, Esq., dated December 29, 1992 (File No. I-T-C-93-057-TC).

[5] See Com Systems Inc., File No. I-T-C-87-042, 2 FCC Rcd 582 (1987); Com Systems, Inc., File No. I-T-C-87-069, 2 FCC Rcd 1782 (1987). The Commission granted a transfer of control of these authorizations from CSI to Resurgens. *See* Com Systems, Inc., 6 FCC Rcd 5732 (1991).

[6] *See Metromedia Company,* 8 FCC Rcd 3149 (1993).

[7] Holders of Series 1 Preferred Stock and Series 2 Preferred Stock in LDDS-METRO will be entitled to vote together with holders of LDDS-METRO common stock, as a single class, and shall be entitled to cast the number of votes per share as such holder would be entitled to cast had such holder converted its preferred stock into common stock.

nications Corp., File No. ITC-93-199-TC, IS GRANTED and we consent to the *pro forma* transfer of control from LDDS to LDDS-METRO Communications, Inc. of the international Section 214 authorizations held by LDDS Communications, Inc. and its subsidiaries (*see* n.2).

12. IT IS FURTHER ORDERED, pursuant to Section 214 of the Communications Act of 1934, as amended, 47 U.S.C. § 214, and Section 63.01 of the Commission's Rules, 47 C.F.R. § 63.01, that the application of Com Systems, Inc. and Resurgens Communications Group, Inc., File No. ITC-93-198-TC, IS GRANTED in its entirety and we consent to the transfer of control from Metromedia Company to LDDS-METRO Communications, Inc. of the international Section 214 authorizations held by Com Systems, Inc. and Resurgens Communications Group, Inc. for international direct services (*see* n.1).

13. IT IS FURTHER ORDERED, pursuant to Section 203 of the Communications Act, as amended, 47 U.S.C. § 203, and Part 61 of the Commission's Rules, 47 C.F.R. Part 61, that LDDS-METRO shall ensure that tariffs continue to be maintained for the services authorized in the Section 214 authorizations being transferred in this order.

14. IT IS FURTHER ORDERED that LDDS-METRO, on behalf of itself and its subsidiaries, shall file annual reports of overseas telecommunications traffic as required by Section 43.61 of the Commission's Rules, 47 C.F.R. § 43.61.

15. IT IS FURTHER ORDERED that LDDS-METRO, on behalf of itself and its subsidiaries, shall file semi-annual circuit reports pursuant to Section 63.15(b) of the Commission's Rules, 47 C.F.R. § 63.15(b).

16. IT IS FURTHER ORDERED that the authorization to provide private lines is limited to the provision of such private lines only between the United States and Israel -- that is, private lines which originate in the United States and terminate in Israel or which originate in Israel and terminate in the United States. In addition, LDDS-METRO and its subsidiaries may not -- and LDDS-METRO's and its subsidiaries' tariff must state that their customers may not -- connect private lines provided over these facilities to the public switched network at either the U.S. or foreign end, or both, for the provision of international basic telecommunications services, including switched voice services, unless authorized to do so by the Commission upon a finding that its correspondents afford resale opportunities equivalent to those available under U.S. law, in accordance with *Regulation of International Accounting Rates, Phase II, First Report and Order*, 7 FCC Rcd 559 (1991), *Order on Reconsideration and Third Further NPRM*, 7 FCC Rcd 7927 (1992), *petition for reconsideration pending.*

17. IT IS FURTHER ORDERED that nothing in this authorization should be construed to include authorization for the transmission of money in connection with the services the applicants seek authority to provide. The transmission of money is not considered to be a common carrier service. Therefore, nothing in this Order should be construed as containing authority for the transmission of money.

18. This order is issued under Section 0.291 of the Commission's Rules, 47 C.F.R. § 0.291, and is effective upon adoption. Petitions for reconsideration under Section 1.106 or applications for review under Section 1.115 of the Commission's Rules, 47 C.F.R. §§ 1.106, 1.115, may be filed within 30 days of public notice of this order (*see* Section 1.4(b)(2), 47 C.F.R. § 1.4(b)(2)).

FEDERAL COMMUNICATIONS COMMISSION

George S. Li
Chief, International Facilities Division
Common Carrier Bureau

Before the
Federal Communications Commission
Washington, D.C. 20554

PUBLIC NOTICE

Released: August 10, 1993

ADDITIONAL QUESTIONS SOLICITED COMMERCIAL RADIO OPERATOR EXAMINATIONS

Our February 17, 1993, Public Notice invited the public to submit questions for the commercial radio operator examinations, especially examination questions for the two new Global Maritime Distress and Safety System (GMDSS) licenses. We received a large number of questions but still need more for some test elements. In particular we have not received enough questions for the GMDSS operator license examination.

We need more questions to implement the new examinations. We particularly wish to avoid delay in offering GMDSS operator licenses and again ask the public for assistance. Specifically, we are asking for questions for the GMDSS operator license (Element 7) and Radar Endorsement (Element 8) examinations. Submit suggested questions by September 24, 1993, to: Federal Communications Commission, Personal Radio Branch, Room 5322, Washington, D.C. 20554, Att'n: COLE Questions.

To be most useful, please phrase each question as a complete sentence. You may refer to a diagram. Include the following for each question:

1. Element number;
2. Correct answer and at least three distracters (wrong answers);
3. Name of source document on which it is based; and
4. Citation for answer.

We request that question length be limited to 210 characters and answer and distracter lengths to 140 characters.

Refer to International Maritime Organization Resolution A.703(17), "Training of Radio Personnel in the Global Maritime Distress and Safety System" (IMO Res. 703), Annex 3, when preparing questions for the GMDSS licenses. The FCC's Report and Order, FO Docket No. 92-206, 8 FCC Rcd 1046 (1993), which privatized the administration of examinations for commercial radio operator licenses, contains general background information. If you have any questions about this, contact George Dillon at (202) 632-7175. We will furnish copies of IMO Res. 703 on request; call (202) 632-7175.

FEDERAL COMMUNICATIONS COMMISSION

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 90-557

In re Applications of

PRAISE BROADCASTING NETWORK, INC. File No. BPH-880519ME

WRIGHTSVILLE BEACH RADIO LIMITED PARTNERSHIP File No. BPH-880519MI

For Construction Permit for
New FM Station on Channel 229A,
Wrightsville Beach, North Carolina

MEMORANDUM OPINION AND ORDER

Adopted: July 30, 1993; Released: August 12, 1993

By the Review Board: MARINO (Chairman), BLUMENTHAL and GREENE

1. Before the Review Board is the *Initial Decision* of Administrative Law Judge Joseph Chachkin, 7 FCC Rcd 4075 (1992), granting the application of Wrightsville Beach Radio Limited Partnership (WBRLP) and denying the competing application of Praise Broadcasting Network, Inc. for a new FM radio broadcast station at Wrightsville Beach, North Carolina. Praise has filed exceptions and WBRLP has filed a brief in support of the *Initial Decision* and limited exceptions. Each has filed a reply. After reviewing the exceptions filed by Praise, WBRLP's reply thereto, and the relevant record, we are remanding this proceeding to the Administrative Law Judge for further hearing regarding WBRLP's financial qualifications.

2. A fundamental requirement of the Communications Act of 1934, as amended, is that applicants be financially qualified. 47 U.S.C. § 308(b). Praise argues that WBRLP has failed to establish its financial qualifications and excepts to the ALJ's failure to designate financial and false certification issues against WBRLP. Praise's March 15 and May 28, 1991 motions to enlarge issues were denied by *Memorandum Opinion and Order,* FCC 91M-2077, released July 5, 1991. We agree that further hearing is necessary, for after reviewing Praise's motions, WBRLP's responsive pleadings and information elicited during the hearing, we find substantial and material questions of fact about the adequacy of WBRLP's financial proposal.

3. WBRLP is a limited partnership comprised of Martha Spainhour, the sole general partner, and Coolidge Road Corp., the limited partner. Joseph Kenary is the president, treasurer, sole director, and sole stockholder of Coolidge Road. Spainhour has 100% of the voting interest and 20% of the equity in the limited partnership. Coolidge Road has 80% of the equity but no voting interest. 7 FCC Rcd at 4079 ¶ 38.

4. As the general partner, Spainhour signed the WBRLP application and certified to WBRLP's financial qualifications. Specifically, she avowed on FCC Form 301 (Oct. 1986 ed.), Sec. III:

> Applicant certifies that sufficient net liquid assets are on hand or that sufficient funds are available from committed sources to construct and operate the requested facilities for three months without revenue.[1]

5. Spainhour has estimated that WBRLP will need $200,000 for constructing the proposed station and operating it without revenues for the first three months. Spainhour Declaration attached to WBRLP's Further Response to Reply to Oppositions to Motion to Enlarge Issues, May 30, 1991; Tr. 361. To meet these costs, WBRLP is relying on two letters, one from American Security Bank of Washington, D.C. to Kenary on May 18, 1988, and one from Kenary to Spainhour on the same date, which is also the date Spainhour certified to the applicant's financial qualifications and signed the application. Tr. 332-33. These are the only financial documents Spainhour has seen. Tr. 343. The American Security Bank letter provides:

> Dear Mr. Kenary:
>
> We are familiar with your proposal to file an application with the Federal Communications Commission for a new radio broadcast license for an FM Station in Wrightsville Beach, N.C.
>
> The Bank is interested in lending you up to $200,000 for the purpose of funding your venture subject to the following stipulations:
>
> (1) You shall be awarded the license from the Federal Communications Commission;
>
> (2) at the time the license is awarded, all credit criteria of the Bank shall be met.
>
> (3) interest shall be calculated at 2.0 percent above the prevailing base rate of this Bank payable monthly in arrears.
>
> (4) there shall be one year moratorium on repayment of the principal; repayments thereafter shall be made in no less than 20 equal quarterly payments.
>
> (5) execution and delivery of a loan agreement, promissory note and other customary documents, in form and sub-

[1] The instructions to section III of this form further provide: "In so certifying, the applicant is also attesting that it can and will meet all contractual requirements, if any, as to collateral, guarantees, and capital investments."

> stance satisfactory to the Bank, including but not limited to receipt of a guarantee from a financially acceptable individual and a security interest in the assets of the station. We recognize, however, that the FCC may require notification and a delay in conjunction with repossession of certain equipment in the event of a default.
>
> This letter is to provide reasonable assurance; it does not constitute a final commitment of funds.

WBRLP Opposition to Motion to Enlarge Issues, Attach. C, May 28, 1991; Praise Exh. 12. The letter is signed by Gregg E. Johnson who is identified on the letterhead as "Vice President." Kenary's letter to Spainhour on the same date provides:

> Dear Martha:
>
> I have received reasonable assurance from American Security Bank of Washington, D.C. that it will provide me with $200,000 in loan funds for use by Wrightsville Beach Radio Limited Partnership, all subject to the conditions set forth in its letter to me of this date.
>
> On behalf of Coolidge Road Corp., this is to provide you with reasonable assurance of the availability of such funds for Wrightsville Beach Radio Limited Partnership subject to their availability from the Bank.
>
> Kindest personal regards.

WBRLP Opposition to Motion to Enlarge Issues, Attach. C, May 28, 1991; Praise Exh. 13.

6. When an applicant relies on a bank loan to establish its financial qualifications, as WBRLP maintains here, it must demonstrate that it had "reasonable assurance" of the loan's availability at the time it certified to its financial qualifications.[2] "A present firm intention to make a loan, future conditions permitting, is the essence of our 'reasonable assurance' standard." *Merrimack Valley Broadcasting, Inc.*, 82 FCC 2d 166, 167 (1980). The Commission has further explained:

> To determine reasonable assurance of a bank loan, we generally consider the following factors: whether the borrower's qualifications have been preliminarily reviewed by the bank; whether adequate collateral has been demonstrated; and whether the tentative terms are specifically identified and acceptable to the lender as well as to the borrower.

Liberty Productions, 7 FCC Rcd 7581, 7584 (1992) (footnote omitted); for a more expansive discussion of these factors, see *Scioto Broadcasters*, 5 FCC Rcd 5158, 5160-61 ¶ ¶ 12-13 (Rev. Bd. 1990).

7. From the record before us, including the pleadings below on Praise's motions to enlarge the issues, we cannot find that WBRLP had reasonable assurance of a loan -- or its proceeds -- from American Security Bank. As Praise notes in its Brief, the letter states that the bank "is interested" in lending Kenary $200,000 but does not clearly express the bank's willingness to do so. *See Scioto*, 5 FCC Rcd at 5161 (bank letter confirming bank's "willingness" to lend provided reasonable assurance). A mere expression of interest in doing business in the future, if that is all this letter represents, would not meet the reasonable assurance standard of *Merrimack Valley*.[3]

8. It is unclear from the letter and the record before us whether the bank has considered the borrower's qualifications. In *Scioto* at 5160 ¶ 12 the Board explained that the relevant factors are:

> Whether (1) the bank has a long and established relationship with the borrower sufficient to infer that the lender is thoroughly familiar with the borrower's assets, credit history, current business plan, and similar data, *see Multi-State Communications, Inc. v. FCC*, 590 F.2d 1117 (D.C. Cir. 1978); or (2) the prospective borrower has provided the bank with such data . . .

Here Kenary has ambiguously described his relationship with the bank only as "personal and professional" and as "professional" and "continuing." Kenary May 30, 1991 Declaration attached to WBRLP Further Response to Reply to Opposition to Motion to Enlarge Issues, May 30, 1991; Tr. 250, 285. But, this description is insufficient by itself to establish reasonable assurance if the bank had insufficient information for evaluating the requested loan. All the record shows is that Kenary had provided the bank with his personal balance sheet, but Kenary is not sure whether this was in connection with the bank letter. Tr. 285. Nothing in the record suggests that any business plan for the proposed station was prepared or presented to the bank, that a plan would be understood from Kenary's past dealings with the bank, or that the bank would simply loan that money to Kenary without considering how he planned to use it. Kenary talked with counsel about construction costs, Tr. 275-77, but his limited grasp of the details during his cross-examination at *id.* and Tr. 280 does not suggest that any business plan discussions he might have had with the bank were meaningful. Indeed, we cannot be sure from the bank letter that the bank even knew about the limited partnership arrangement,[4] which would seem to be central to the bank's analysis of Kenary's planned use of the money. The bank letter is addressed to Kenary and refers to "your proposal" and "your venture"; the bank had no

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[2] At the time WBRLP filed its application, the Commission relied on a box-checking certification process rather than the filing of documentation.

[3] When asked how he came to obtain the letter from American Security Bank, Kenary explained only that: "Well, I've had prior contacts and relationship with American Security for many years." Tr. 250.

[4] In his May 30, 1991 Declaration given under penalty of perjury and attached to WBRLP's Further Response to Reply to Opposition to Motion to Enlarge Issues, May 30, 1991, Kenary said:

> I had maintained a personal and professional relationship with the American Security Bank and discussed with the bank the purpose of the commitment. I do not recall

financial information about the general partner, Tr. 251; and WBRLP has maintained throughout that Kenary, not WBRLP, is borrowing the money from the bank. *See, e.g.,* WBRLP Reply Brief at 10. If the bank is relying on Kenary's assets, it is not clear that it understands that these assets may be diminished by the amount of Kenary's contribution to WBRLP's capital, particularly if it is not aware of the limited partnership.[5] And, as Praise has argued, Kenary at Tr. 271 seemed uncertain of the bank's commitment. Praise Brief at 18 n.16.

> whether I advised the bank that the application to which I was a party was a limited partnership, but I am certain that I did not provide any information to the bank concerning the general partner or her financial condition.

The fact that the bank appears to have had no information on Spainhour may be critical from a second aspect as well. In its seminal statement on two-tiered ownership structures, the Commission explained:

> Essentially, a limited partnership is a business enterprise composed of: (1) one or more general partners who exercise complete managerial control over the business' affairs *and who are personally liable for the partnership debts;* and (2) one or more limited partners who invest capital and share in the profits, but do not exercise any managerial control and do not incur any personal debts beyond their initial capital contribution.

Minority Ownership In Broadcasting, 92 FCC 2d 849, 854 (1992)(emphasis added). In view of Spainhour's serious financial difficulties, on top of the *other* problems we here find with WBRLP's financial certification, we expect WBRLP to document at hearing just how Spainhour expects to show responsibility for any station debt(s), beyond Kenary's "limited" liability, bearing in mind that she has no experience in broadcasting. Further, Spainhour's inexperience, plus her failure to pay fully for her 20% equity share of the applicant while receiving a management fee and an allocation of only 5% of the partnership's profits and losses until the limited partner's capital contribution is repaid with interest, WBRLP Exh. 3 at 3 ("Management Fee"), 5 ("Transition Amount"), 11 § 5.3, 18 Art. VIII, raises parallel questions about the *bona fides* of this entire ownership structure. *See generally Fresno FM Limited Partnership,* 6 FCC Rcd 6998 (1991); *Mableton Broadcasting Co., Inc.,* 5 FCC Rcd 6314, 6314-18 (Rev. Bd. 1990). At first blush, this may be another case of a putative "limited" partner "giving away the store." *See Metroplex Communications, Inc.,* 5 FCC Rcd 5610 (1990) (subsequent history omitted); *Royce International Broadcasting,* 5 FCC Rcd 7063, 7064 n.10 (1990) (subsequent history omitted). We will review the record in this regard also. *Cf. Richardson Broadcast Group,* 7 FCC Rcd 1583, 1587 ¶ 25 (1992), where, in light of the general partner's precarious financial condition, the Commission was concerned that a loan to the partnership could be used to exert leverage over the general partner.

[5] At the hearing Kenary explained at Tr. 242-43:

> [Counsel] Okay. Now, Coolidge Road Corporation, the limited partner is -- is -- is -- is -- is funded completely by yourself. Is that correct?
>
> [Kenary] That's right.
>
> Q And -- and the obligations that Coolidge Road has to Wrightsville Beach Limited Partnership are to be -- are -- are to be satisfied by -- by yourself. Is that correct, the financial obligations?
>
> A Yes, or borrowed funds, if I should choose to do it, but I don't intend to do that; I would never do that.
>
> Q Well, let me understand that a little bit. Isn't it true that you arranged with American Security Bank for a bank letter for the -- for the -- for the -- for certain funds to be provided through Coolidge Road to Wrightsville Beach Radio Limited Partnership?
>
> A Yes. That's correct. Well, actually -- yes, that's right.

Kenary further explained at Tr. 271-72 (emphasis added):

> [ALJ] But do I understand that it's your intention to provide $180 thousand capital, in addition to providing a loan in the amount of $200 thousand?
>
> [Kenary] *If the bank comes forward with the money,* very definitely.
>
> * * *
>
> [ALJ] So, what you're saying is that you have obligated yourself to provide $180 thousand from your own funds, in addition to providing an additional $200 thousand which will be based on funds you've secured which you're going to loan the corporation?
>
> [Kenary] That's correct.
>
> Q So, your commitment is for $380 thousand?
>
> A Well, yes, that's right.

Kenary's personal balance sheet given to the bank included the assets comprising the $180,000 capital contribution. Tr. 285. At an earlier stage in this proceeding, in a March 27, 1991 Declaration given under penalty of perjury and attached to WBRLP's March 28, 1991 Opposition to Motion to Enlarge Issues, Kenary gave an apparently inconsistent explanation of his intentions:

> On May 13, 1988, Ms. Spainhour and I signed the WBRLP "Limited Partnership Certificate and Agreement of Limited Partnership" ("Agreement"). In Schedule A of the Agreement, my Capital Contribution is listed as $180,000. My said letter of May 18, 1988, superseded the reference to $180,000 in Schedule A of the Limited Partnership Agreement in order to clearly demonstrate the availability of $200,000 to the partnership.

No amendment to the limited partnership agreement to this effect appears in the record, however. The limited partnership agreement does not require Kenary to provide the venture with more than his capital contribution. *See* WBRLP Exh. 3 at 9 § 4.3.

9. The bank letter also leaves open the question of collateral. It provides for a guarantee and a security interest in the station's assets (suggesting Kenary's intended use of the money is relevant to it), but it clearly states that more may be required. The guarantee must be "from a financially acceptable individual" who is not named in the letter, and nothing in the record shows that the bank has considered whether Kenary would be financially acceptable to it – or, as Praise argues in its Brief at 16, that he is willing to provide the guarantee. Furthermore, because Spainhour may not have received a copy of the bank letter before certifying to the applicant's financial qualifications, *see* Tr. 252-53, we cannot be sure she was aware of and amenable to pledging the proposed station's assets as security, and nothing in the record suggests that she had any idea of what the arrangements would be between Kenary, Coolidge Road, the bank, and WBRLP. Although WBRLP argues in its Reply Brief at 10-11 that Spainhour had reasonable assurance merely from Kenary's telephone call advising her that the necessary funds are available from the bank, both *Liberty* and *Scioto* instruct that she must know the terms and conditions applicable to the applicant so that she can make an informed decision as to whether the terms and conditions are acceptable.

10. Thus, we are confronted with a certification of financial qualifications based on a bank letter that may merely be an "accommodation" to Kenary from a friendly banker with whom he has a "personal and professional" relationship. *See, e.g., Janice Fay Surber,* 5 FCC Rcd 6155, 6157 (Rev. Bd. 1990); *Shawn Phalen,* 5 FCC Rcd 2622, 2623-24 n.2 (Rev. Bd. 1990). Our concern is heightened here because the bank appears to know nothing of the true applicant, whose general partner is inexperienced in broadcasting, Tr. 202, 295, and who has been shown to be dependent for her capital contribution on either revenues from the foreclosure sale of a house jointly owned with her estranged husband[6] or "a signed written guarantee" from her mother "advancing some of [her] inheritance." Tr. 327-28.[7]

11. In the absence of reasonable assurance from the bank, the capitalization plan appears to be inadequate for establishing WBRLP's financial qualifications. The limited partnership agreement provides for a total capital contribution from general and limited partners of $195,000, which is comprised of Spainhour's $15,000 and Kenary's Coolidge Road Corp.'s $180,000. Even assuming that Spainhour is able to make all of her contributions, an assumption not supported by the information available to us so far, the capitalization plan is $5,000 less than Spainhour has said is needed for construction and initial operation without revenues. Kenary claims to have made his first two capital contributions, and the money is being used for the applicant's prosecution expenses. Spainhour Declaration, Further Response to Reply to Opposition to Motion to Enlarge Issues, May 30, 1991; Tr. 271-72, 273-74. This further increases the shortfall between the required capital contributions and the amount WBRLP needs to be financially qualified. Furthermore, Kenary testified he never gave the general partner his balance sheet, Tr. 282, and Spainhour never asked for it, Tr. 313, which raises a question as to whether she had adequately ascertained Kenary's ability to meet the Coolidge Road capitalization commitment before certifying to WBRLP's financial qualifications. *See Aspen FM,Inc.,* 6 FCC Rcd 1602, 1603 ¶ 8 (1991), citing *Northampton Media Associates,* 4 FCC Rcd 5517 (1989) (applicant must take necessary steps to determine that source of financing, when not a financial institution, has sufficient resources to meet commitment). Spainhour said she relied only on the assurance from WBRLP's then counsel, the late Forbes Blair, whom Kenary had known for twenty years, Tr. 242, that she "didn't have anything to worry about" because Kenary was "financially stable." Tr. 329, 342. Further hearing is necessary to determine whether WBRLP is financially qualified and whether it falsely certified to its financial qualifications.

12. ACCORDINGLY, IT IS ORDERED That this proceeding IS REMANDED to the Presiding Officer for further hearing and the preparation of a Supplemental Initial Decision on the following issues:

(a) To determine whether Wrightsville Beach Radio Limited Partnership is financially qualified to be a Commission licensee.

(b) To determine whether Wrightsville Beach Radio Limited Partnership falsely certified its financial qualifications and, if so, the effect thereof on its qualifications to be a Commission licensee.

FEDERAL COMMUNICATIONS COMMISSION

Marjorie Reed Greene
Member, Review Board

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[6] WBRLP Opposition to Motion to Enlarge Issues at 7 n.2, and Declaration of David G. Sneeden, Attachment A at 2, June 17, 1991. After certifying to WBRLP's qualifications, in December 1990, Spainhour voluntarily joined the Chapter 13 bankruptcy proceeding involving her estranged husband. She sought dismissal from the bankruptcy proceeding in the spring of 1991 after agreeing to the sale of the house. When her estranged husband failed to make the payments he had agreed to under the plan, the bank foreclosed on the house. *See also* Spainhour May 30, 1991 Declaration attached to WBRLP Further Response to Reply to Opposition to Motion to Enlarge Issues, May 30, 1991 ("My primary asset is the residence I jointly own with my husband.").

[7] The limited partnership agreement calls for a capital contribution of $15,000 from Spainhour in three equal installments. WBRLP Exh. 3 at 8, 28. Spainhour made the first installment, but as of the hearing had not made the second installment, which had been due when the hearing was designated. Tr. 326-27. The ALJ accepted for section 1.65 reporting purposes only WBRLP's April 8, 1992 amendment purporting to show that Spainhour had made her second capitol contribution. 7 FCC Rcd at 4083 n.4.

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

Billy L. Inabnet File No. 066095
dba Inabnet Communications Services

Application for modification of
Private Carrier Paging License

ORDER

Adopted: July 27, 1993; Released: August 10, 1993

By the Deputy Chief, Licensing Division:

1. Florida Network USA ("FNUSA") and Answerstat, Inc. filed a Joint Petition for Reconsideration challenging the grant of a Private Carrier Paging license to Billy J. Inabnet dba Inabnet Communications Services ("Inabnet") without a condition requiring use of terminal connection equipment. Inabnet, already a paging system operator in the Jackson, Mississippi area, applied for and received a license grant to add three new transmitters to his system in nearby Yazoo City, Vicksburg, and Ridgeland, Mississippi. Petitioners are other paging operators in the Jackson, Mississippi area.

2. Until Inabnet's recent expansion, FNUSA, Answerstat, Inabnet, and C.D.E. voluntarily used an arbitrator to facilitate channel sharing on the paging frequency they share, 152.480 MHz. An arbitrator is an electronic device connected to each of the paging systems allowing each paging operator a certain period of time (approximately one minute) to transmit and then rotating to the next operator. Petitioners seek to have the Commission require Inabnet to connect his three new transmitters to the arbitrator. For the reasons that follow, we will return Inabnet's application to pending status and permit Inabnet to demonstrate within thirty days that significant destructive interference will not occur. If Inabnet does not make a satisfactory demonstration we will grant the license with conditions requiring terminal interconnect equipment.

3. The frequency coordinator, NABER, has recommended use of the arbitrator for the new transmitters. Also, the petitioners have submitted the statement of an engineer, Kevin F. O'Brien, predicting that interference will occur if Inabnet does not connect these new transmitters to the arbitrator. O'Brien's statement is based on a study conducted taking into consideration the separation between Inabnet's new transmitters and pre-existing paging systems.

4. NABER recently asked the Commission to amend its rules to allow a requirement that paging operators be required to employ terminal connection (such as an arbitrator) as a precondition of a license. The Chief of the Private Radio Bureau denied NABER's request stating that this type of interference prevention equipment may be required to resolve interference problems, and that while NABER may make recommendations to prevent interference, such recommendations will be handled on a case by case basis. *Order,* RM-7873, 7 FCC Rcd 159 (1992). Petitioners assert that this is one of the cases where the use of terminal connection equipment is appropriately required before licensing additional paging transmitters in this area on this frequency.

5. The engineering statement submitted predicts that Inabnet's proposed operation will result in simultaneous seizure of the frequency. This is a crippling problem for paging operators in other areas. Initially we refused to act on NABER's recommendation because neither petitioners nor NABER provided any evidence that interference would result from Inabnet's proposed operation. Petitioners have now provided a detailed statement from a qualified engineer who appears to have done a thorough analysis of the interference problem posed by Inabnet's proposed expansion.

6. Further, paging operators in this area have incurred the significant expense of purchasing interconnect equipment. Inabnet has not produced any evidence to establish that connecting its new transmitters to existing paging operators is not necessary. We will allow Inabnet thirty days to make such a showing.

III. ORDERING CLAUSE

7. For the reasons discussed above, IT IS ORDERED THAT the Petition For Reconsideration filed by FNUSA and Answerstat, Inc. IS GRANTED IN PART. The grant of Inabnet's application for modification of its Private Carrier Paging License is hereby SET ASIDE, and the application will be returned to pending status.

FEDERAL COMMUNICATIONS COMMISSION

W. Riley Hollingsworth
Deputy Chief, Licensing Division

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 92-34

In the Matter of

DEBRINE COMMUNICATIONS, INC.

Licensee of Station KBRS(AM)
Springdale, Arkansas

Order to Show Cause Why the
License for Station KBRS(AM),
Springdale, Arkansas, Should
Not be Revoked

and File No. ARN-921127EC

In re Application for

Assignment of License
of KBRS(AM) from
Debrine Communications,
Inc., to Elvis L. Moody
Springdale, Arkansas

ORDER

Adopted: August 3, 1993; Released: August 10, 1993

By the Chief, Mass Media Bureau:

1. The Commission has before it an application for assignment of license of KBRS(AM), Springdale, Arkansas, from Debrine Communications, Inc. (Debrine) to Elvis L. Moody (Moody) filed by Moody on November 27, 1992. Also before the Commission is an *Order*, FCC 92M-518, released May 6, 1992, by the Chief, Administrative Law Judge, Joseph Stirmer, terminating the hearing proceeding in this docket and certifying the case to the Commission.

Background

2. On March 26, 1992, the Commission issued an *Order to Show Cause and Hearing Designation Order ("OSC")*, 7 FCC Rcd 2118 (1992) in which it ordered Debrine to show cause why its license to operate KBRS(AM) should not be revoked. The *OSC* was based on the fact that KBRS(AM), in apparent violation of Sections 73.1740(a)(4) and 73.1750 of the Commission's Rules, had been off the air without authority for an extended period of time and the licensee had not turned in its license. In his *Order*, the Presiding Judge, pursuant to Section 1.92(c) of the Commission's Rules, terminated the proceeding because of the licensee's failure to file the requisite notice of appearance.

3. Commission records indicate that KBRS(AM) has been off the air without authority from the Federal Communications Commission since December 30, 1989. All correspondence, including the *OSC*, directed to Debrine's last known address has been returned by the U.S. Postal Service as undeliverable. In light of the foregoing, we conclude that Debrine has violated Sections 73.1740 and 73.1750 of the Commission's Rules and that Debrine is not qualified to remain the licensee of station KBRS(AM).[1]

4. Moody requests that the Commission approve the assignment of the license to him from Debrine.[2] Moody contends that such action would be consistent with the Commission's recognition of the public interest in protecting innocent creditors of broadcast stations. *Citing, Second Thursday Corporation*, 22 FCC 2d 515 (1970), *reconsideration granted*, 25 FCC 2d 112 (1970) (*Second Thursday*). Moody provides a November 20, 1989, "Decree in Foreclosure" calling for a sale of Debrine's assets to satisfy its debt, in the amount of approximately $238,000, to the station's former owner, Donrey, Inc. ("Donrey"). In addition, Moody provides a letter from Donrey's attorney stating that Donrey was the only bidder for KBRS(AM)'s assets and that its bid would leave a debt of approximately $3,000. In exchange for the license, Moody will pay Debrine $3,000 (Moody states that he has previously purchased the broadcast equipment of Debrine from Donrey), which will allow for satisfaction of the outstanding debt. Moody also contends that the assignment will serve the public interest by preserving the only full time AM station in Springdale, Arkansas. In support of this contention, Moody provides an engineering study by his consulting engineer which establishes that, under the Commission's current AM spacing rules, if Debrine's license for KBRS(AM) is revoked, no applications for the station would be accepted.

Discussion

5. In *Second Thursday* the Commission created an exception to its general rule that where there were character qualification issues pending against a renewal applicant, an assignment of license would not be granted prior to a resolution of those issues. *See Hertz Broadcasting of Birmingham, Inc.*, 57 FCC 2d 183, 184 (1976). Under this exception, the Commission will approve a transfer without a hearing on the issues when it is convinced that the alleged wrongdoer will derive no benefit, either direct or indirect, from the sale, or in the alternative, will derive only minor benefits which are outweighed by the equities in favor of the innocent creditors. In *Second Thursday* the Commission permitted the transfer of a station in hearing, where the licensee was in bankruptcy, based on its finding that there were "substantial equities in favor of innocent creditors and the public interest in the resumption of service." 25 FCC 2d at 115. The benefit to creditors was approximately $115,000, most of which would have been lost had the renewal application been denied.

[1] Although the Commission included a *Notice of Apparent Liability* for willful or repeated violations of Commission rules, no forfeiture is being imposed because of the action taken herein.

[2] Moody's assignment application includes an "Assignor's Certification" signed by Fred DeBrine, President of Debrine.

6. In the instant case, there does not appear to be any benefit to creditors to be obtained by approving the transfer. Moreover, there is no indication that Debrine is currently in bankruptcy. While Moody notes that there was a deficiency of $3,000 after the sale of Debrine's assets in 1989, Donrey has apparently chosen not to pursue Debrine for this deficiency. Indeed, in a letter dated December 22, 1989, Donrey's attorney recommended that it would not be worth the effort to pursue a deficiency judgement. Thus, it appears that Donrey, the creditor, was satisfied as of December 1989 and that Moody has attempted to use the fact of Debrine's former indebtedness to create a scenario which would bring him within the *Second Thursday* doctrine, for his own interests. Under these circumstances, we will deny Moody's request for relief under the Commission's *Second Thursday* exception.

7. Moody's claim that the transfer is in the public interest because under the Commission's new rules an application for identical facilities to replace KBRS(AM) would not be acceptable, is not compelling. *See Review of the Technical Assignment Criteria for the AM Broadcast Service (Report and Order),* 6 FCC Rcd 6273 (1991). As the Commission stated in its *Report and Order,* the new rules are part of "a comprehensive plan that will eventually achieve a significantly improved AM service." 6 FCC Rcd at 6273 (1991). Other than to note that the new rules would prohibit new applications for this station, Moody has not presented any basis for the waiver. *See, WAIT Radio v. FCC,* 418 F. 2d 1153, 16 RR 2d 2107 (D.C. Cir. 1969) ("any waiver request must demonstrate with particularity the facts and circumstances which would warrant such action, and give affirmative reasons to justify a grant of the waiver in the public interest.").

8. Accordingly, IT IS ORDERED, that the license of Debrine Communications, Inc. for KBRS(AM), Springdale, Arkansas, IS REVOKED.[3]

9. IT IS FURTHER ORDERED, that Moody's request for relief pursuant to our *Second Thursday* doctrine is denied and his application for assignment of KBRS(AM) from Debrine to Elvis L. Moody IS DISMISSED, with prejudice.[4]

10. IT IS FURTHER ORDERED that the hearing proceeding in MM Docket 92-34, wherein Debrine Communications, Inc. was directed to show cause why its license for Station KBRS should not be revoked, IS TERMINATED.

FEDERAL COMMUNICATIONS COMMISSION

Roy J. Stewart
Chief, Mass Media Bureau

[3] The Commission has delegated authority to the Mass Media Bureau to process requests for relief pursuant to the *Second Thursday* policy. *NewSouth Broadcasting, Inc.,* 8 FCC Rcd 1272 (1993).

[4] In *Radio Northwest Broadcasting Company,* 4 FCC Rcd 596 (1989) the Commission granted the Mass Media Bureau delegated authority in silent station cases to issue Orders of Revocation when the Presiding Judge makes a finding that, pursuant to Section 1.92(a) of our Rules, the licensee has waived its right to a hearing.

Before the
Federal Communications Commission
Washington, D.C. 20554

In re Application of

TELEPORT COMMUNICATIONS - NEW YORK — File No. 13135-CF-TC-(3)-92

For Transfer of Control of
Stations WLU372, WLW316 and WLW317
from Merrill Lynch Group, Inc.
to Cox Teleport, Inc.

ORDER ON RECONSIDERATION

Adopted: July 16, 1993; Released: August 10, 1993

By the Commission:

BACKGROUND

1. Communications Workers of America (CWA) has filed a petition requesting that the Commission reconsider including a certain phrase in *Teleport Communications - New York*, 7 FCC Rcd 5986 (1992) (*"Teleport Order"*), *petition for review docketed sub nom United States Telephone Association v. FCC*, No. 92-1521 (D.C. Cir. filed October 5, 1992). The phrase represents the Commission's statement that Teleport does not control bottleneck facilities. Responsive pleadings were filed by the United States Telephone Association (USTA), Teleport Communications - New York (TCNY) and Cox Teleport, Inc. (Cox).

2. In the *Teleport Order*, we held that the telephone company - cable television cross-ownership prohibition of Section 613(b)(1) of the Cable Act does not apply to the purchase of TCNY by Cox. We based our decision on the finding that we have consistently interpreted the cross-ownership prohibition to apply only to traditional local exchange common carriers within their local exchange telephone service areas. We found that Teleport is not a traditional landline local exchange company with monopoly control of bottleneck facilities. (*Teleport Order*, 7 FCC Rcd at 5988, paragraph 16). We also found that even assuming Teleport were a common carrier for purposes of the statutory ban, Teleport would not be covered by the ban because it does not have a "telephone service area" within the area being served by Cox's affiliate, Staten Island Cable. Finally, we agreed with USTA that the telephone company - cable television cross-ownership restriction is no longer necessary, and indicated that we are recommending to Congress that the ban be repealed. We stated, however, that "[u]ntil and unless Congress acts to change the statute, we must continue to enforce the cross-ownership restriction." *Teleport Order*, 7 FCC Rcd at 5988, paragraph 18.

PLEADINGS

3. In its petition for reconsideration, CWA requests only that we delete the last phrase of paragraph 14 of the *Teleport Order*,[1] which states:

> The issue with which we are presented is whether the telephone company - cable cross-ownership prohibition of Section 613(b)(1) in the Cable Act applies to Cox's proposed ownership of Teleport. The facts show that Teleport is a non-dominant carrier which uses fiber optic lines to provide certain common carrier telephone services, *but that it does not control bottleneck facilities.*[2]

4. In support of its request, CWA argues that the record shows Teleport does own conduit in its service area, and in particular, on Staten Island. CWA argues that Teleport owns "unique conduit" which must be deemed "bottleneck facilities" within the meaning of the telephone company - cable cross-ownership prohibition. CWA also argues that New York Telephone's conduits cannot be considered "bottleneck facilities" because Teleport was able to build around them when constructing its own conduit. Thus, CWA argues, the Commission is acting in an arbitrary and capricious manner, and denying telephone companies equal protection of the law, because it defines "equivalent 'bottleneck facilities' of two such common carriers subject in whole or in part to Title II of the Act differently." (Petition at p.4).

5. Commenting in support of CWA, USTA argues that the Commission's statement is incorrect as a matter of fact because Teleport has received the right to occupy bridges and the approaches thereto on Staten Island from the New York Port Authority. USTA states that Teleport now also has authority to provide intra-city telephone service in White Plains, NY, an area in which Teleport also holds a cable franchise. USTA further argues that the Commission's statement is incorrect as a mixed conclusion of fact and law because the phrase "in its telephone area" should not be "equated solely with the ownership of conduit by a traditional telephone company within its service area." (Comments at p. 4). USTA argues, as it did in the earlier portion of this proceeding, that the Cable Act applies to all carriers subject to Title II of the Communications Act and that limiting applicability of the Act to traditional telephone companies within their own service areas is not in keeping with the plain language of the Act.

6. USTA further argues that the First Amendment standards for restricting telephone companies' "ability to speak" are violated by the Commission's basing the cross-ownership restriction on control of bottleneck facilities, which it claims is broader and more restrictive of speech than necessary. It also claims that the Commission's ap-

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[1] In opposition to CWA, Teleport and Cox argued that CWA's requested relief, even if granted, would have no legal effect because the *Teleport Order* made findings that Teleport owns no bottleneck facilities in places other than paragraph 14, and removal of this phrase from paragraph 14 would leave the ultimate findings undisturbed. While this is true, we consider CWA's petition and USTA's supporting comments in the broader context in which they were intended. That is, we assume they meant for the phrase to be deleted wherever it appears.

[2] Teleport Order, 7 FCC Rcd at 5987, paragraph 14; emphasis added.

proach violates the Equal Protection Clause because it treats carriers without bottleneck facilities differently than cable companies and electric companies. (Comments at 5). In addition, USTA argues that the Commission arbitrarily bases its definition of "bottleneck facilities" on the ownership of those facilities. USTA argues that whether or not the facilities are bottleneck is based upon their "inability to be duplicated." (Comments at p. 6).

7. Cox and Teleport oppose CWA and USTA. Teleport argues that it is a non-dominant carrier and hence, by definition, does not control bottleneck facilities. Teleport points out that the Commission found that the proposed transfer of control of TCNY to Cox Teleport, Inc. would not violate the telephone company - cable television cross-ownership prohibition in 47 U.S.C. §613(b) because Teleport is not the type of common carrier addressed in the Act; *i.e.,* it cannot engage in anticompetitive conduct by denying cable companies access to a ubiquitous conduit and telephone pole system.

8. Cox points out that Commission precedent holds that an entity cannot be a non-dominant carrier and control bottleneck facilities, citing *Policy and Rules Concerning Rates for Competitive Common Carrier Services and Facilities Authorizations,* First Report and Order, 85 FCC 2d, 1, 21 (1980), Second Report and Order 91 FCC 2d 59 (1982), Fourth Report and Order, 95 FCC 2d 554 (1983). It asserts that New York Telephone and Teleport cannot be considered equivalent for purposes of the Cable Act prohibitions on cross-ownership because New York Telephone has ubiquitous, contiguous facilities covering the entire City of New York, including the bridges to Staten Island cited by USTA. Cox argues that Teleport's conduit does not cover any area of New York City that New York Telephone's conduit does not also cover, and that because Teleport can provide only duplicate conduit in a few non-contiguous areas of the City, Teleport is not in a position to be a bottleneck to cable companies.

9. In reply, CWA argues that the plain language of the statute does not support distinction among carriers based on dominance or non-dominance. It argues that the statute clearly states that "any common carrier, subject in whole or in part to Title II of this Act. . ." is subject to the cross-ownership restriction. Moreover, CWA argues that Congress did not imply a test of dominance in the Cable Act because earlier drafts of the Act contained the term "dominant carrier" which was not included in the final version of the Act.

10. CWA further argues that "mere ownership of conduits does not imply the power to set prices for . . . services . . . where the owner lacks the legal ability to control others' use of those conduits." Reply at p.8. In fact, it points out that under Section 224 and New York State law, New York Telephone lacks the element of control over access to its conduits.[3]

DISCUSSION

11. CWA's request that we strike the finding that Teleport does not control bottleneck facilities must be denied, because there is no showing that the finding was in error. In any event, the result it seeks -- to extend the cross-ownership ban to Teleport -- is not justified. Teleport does not have the control of bottleneck facilities as do telephone companies that were the object of the ban, so it is not subject to the telephone company - cable television cross-ownership restriction contained in the Cable Act.

12. First, although Teleport owns some conduit, petitioners have presented no evidence of how that conduit could act as a bottleneck to development of a cable television system. Moreover, because Teleport's conduit is not contiguous, there is doubt as to whether any of its facilities are suitable for cable television company use.[4]

13. Second, the rationale underlying the ban does not support extending the ban to Teleport. In adopting the cross-ownership ban, which subsequently was largely codified, the Commission identified a potential for anticompetitive behavior by the monopoly local exchange telephone company in the community, which would control pole and conduit space required for the construction and operation of cable television systems. *Applications of Telephone Companies for Section 214 Certificates for Channel Facilities Furnished to Affiliated Community Antenna Television Systems* Final Report and Order, 21 F.C.C.2d 307, 324, *recon. in part,* 22 F.C.C.2d 746 (1970), *aff'd sub nom. General Telephone Company of the Southwest v. United States,* 449 F.2d 846 (5th Cir. 1971). In New York City, including Staten Island, as well as in White Plains, New York Telephone, but not Teleport, has the characteristics of a dominant local exchange telephone company. Teleport does not offer local exchange telephone service of the ubiquitous, contiguous nature that New York Telephone does. Teleport can only offer some telephone access services in competition with New York Telephone; Teleport is not the primary, ubiquitous local exchange telephone service provider in New York City. In fact, Teleport, which the Commission has identified as an "interconnector," is dependent on New York Telephone for providing much of its service. *See Emergency Petition for Declaratory Ruling,* 8 FCC Rcd 2578 (1993).

14. Finally, the Commission has consistently ruled that the ban applies only to traditional local exchange carriers. *Teleport Order,* 7 FCC Rcd at 5987-5988, paragraph 15, and cases cited therein. Congress largely codified the cross-

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[3] USTA filed two requests for official notice of certain statements made by Teleport Communications Group (TCG) and the President of TCG. Teleport moved to strike the requests for official notice, arguing that the comments are consistent with its status as a non-dominant carrier. In addition, Cox filed a motion for leave to file a reply to USTA's supporting comments, and USTA filed a surreply. While we permit these documents into the record, they generally constitute repetitive argument.

[4] The fact that New York Telephone may be required by State law to make its conduits available on a non-discriminatory basis to all users reinforces our finding that New York Telephone controls bottleneck facilities and that Teleport does not; our finding is further strengthened by the fact that non-discriminatory access regulations have been found to be necessary by both state and federal government authorities. However, USTA is correct that such regulations help make the telephone company - cable television cross-ownership prohibition unnecessary, and this is one of the reasons that this Commission has suggested to Congress that the prohibition be repealed. We note that Section 224 of the Communications Act does not of itself impose mandatory access obligations to telephone company poles. *See* Florida Power Corporation v. FCC, 480 U.S. 245 (1987).

ownership restriction and, in doing so, allowed our interpretation of the prohibition to stand. We find no basis to change our interpretation of the Cable Act's cross-ownership restriction after the long history of precedent associated with this policy, as CWA and USTA request.[5] We conclude that our finding that Teleport "does not control bottleneck facilities" for purposes of the cross-ownership prohibition is correct.[6]

CONCLUSION

15. Petitioners have neither demonstrated our conclusion that Teleport does not control bottleneck facilities was in error, nor, more to the point, have they demonstrated that Teleport's acquisition by Cox was a violation of the Cable Act.

ORDERING CLAUSE

16. ACCORDINGLY, IT IS HEREBY ORDERED That the Petition for Reconsideration filed by Communications Workers of America IS DENIED;

17. IT IS FURTHER ORDERED That the Motion to Strike filed by Teleport Communications - New York IS DENIED.

FEDERAL COMMUNICATIONS COMMISSION

William F. Caton
Acting Secretary

[5] USTA's concern, expressed in its Surreply, that this Commission would be powerless to "mind the store" as competitive access providers build out until they are "indistinguishable from traditional local telephone companies in the competitive exchange environment" is unsupported. The Commission has ample jurisdiction under the Communications Act to address any practices of competitive access providers that are inconsistent with the provisions or purposes of the Act.

[6] Given this conclusion, and the distinctions between New York Telephone and Teleport, we disagree with CWA that the Equal Protection Clause is implicated. In any event, we find our distinctions to be rational. We find further that USTA has failed to explain in what way the *Teleport Order* violates the Equal Protection Clause. Finally, we believe our "bottleneck facilities" standard is tailored to be consistent with the First Amendment and note that USTA does not suggest an alternative, less restrictive test.

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

Request for waiver of the requirements in Section 80.453 of the Rules to permit public coast station WCM to serve mobile vehicles on land.

ORDER

Adopted: August 5, 1993; Released: August 11, 1993

By the Chief, Special Services Division:

1. The Ohio River Company (ORC), licensee of medium/high frequency (MF/HF) public coast station WCM, has requested a waiver of Section 80.453 of the Rules, 47 C.F.R. § 80.453, and modification of its station license to permit it to serve a limited number of land mobile vehicles on a secondary basis. This action grants the requested waiver.

2. In the *Report and Order* in PR Docket No. 86-2, 1 FCC Rcd 1312 (1986) (*Report and Order*), the Commission declined to adopt rules that would have permitted VHF public coast stations to serve vehicles on land on a subsidiary basis. The Commission found that conditions in the VHF public coast station market are not sufficiently homogeneous to permit such service nationwide. *See Report and Order* at paragraph 7. Nevertheless, the Commission recognized that "there may be cases where individual stations or systems of stations may have excess capacity on an hourly, daily or seasonal basis and could design a subsidiary service to vehicles which would ensure against interference to, or derogation of, maritime communications." *Report and Order* at paragraph 8. The Commission indicated that it would consider such requests for waiver of the rules on an *ad hoc* basis. The Commission has since granted several such waivers.[1] The Commission based the waivers on the fact that each station had limited marine traffic that was variable in terms of peak usage. The Commission allowed land mobile service to be offered to a limited number of vehicles during off peak periods on a strictly secondary basis. The Commission has received no complaints about these operations.

3. Authorization of service to land vehicles must be carefully scrutinized to ensure that maritime public correspondence, which is part of a safety service, is not impaired. In support of its request, ORC indicates that it will provide services to a limited number of land vehicles associated with an affiliated company, only during times of emergency when land line communications are unavailable. There is sufficient capacity in the MF/HF frequencies WCM uses to serve land vehicles in emergency situations without degradation to maritime communications.

4. We are waiving the rules, therefore, to permit ORC to provide subsidiary service to five land vehicles as discussed above. The waiver is contingent, however, on the conditions set forth below. Furthermore, such subsidiary service must cease within thirty days of the date of written notice if the Commission's staff determines that maritime communications are being impaired.

5. To minimize the potential for interference with other maritime safety or operational communications, the radio equipment installed in vehicles served by ORC must be type accepted for use in the Maritime Services (Part 80) or the Private Land Mobile Services (Part 90), and must be capable of operating only on the maritime public correspondence channels authorized for use by the public coast station. The mobile radios installed in vehicles may be crystal controlled with only the appropriate crystals installed, or frequency synthesized equipment with switch or front panel "blocks" to prevent operation on other channels. The radios installed in the vehicles must not be capable of being tuned by front panel operation to any channel other than those authorized for station WCM. Electrical or mechanical modifications of equipment beyond the scope of Class I permissive changes are not necessary to satisfy this condition. Therefore, no filing with the Commission should be required regarding such changes. *See* Section 2.1001 of the Rules, 47 C.F.R. § 2.1001. Our intent is to prevent equipment installed in vehicles from operating on unauthorized frequencies by merely tuning such frequencies with external controls.

6. In the *Notice of Proposed Rules Making* (*NPRM*) in PR Docket No. 86-2, 51 Fed. Reg. 4525 (1986) at paragraph 8, the Commission indicated its intention to license subsidiary services on a "system basis." That is, it proposed that land vehicles utilize a public coast station's excess capacity to operate under the public coast station's license. Vehicle identification must consist of the public coast station's call sign and a numeric or alphabetical unit identifier. This increases the public coast station's incentive to control the vehicles' communications because enforcement efforts will focus on the public coast station licensee rather than on individual vehicle operators. Also, authorizing subsidiary service on a system basis reduces paperwork requirements for both the public and the Commission by eliminating the need for separate licenses for each vehicle. Therefore, the license of ORC will be modified accordingly. This method of licensing and identification will ensure that the licensee will take all necessary steps to prevent impairment of maritime services, consistent with the concerns expressed in PR Docket No. 86-2.

7. IT IS THEREFORE ORDERED, pursuant to the authority contained in Sections 0.331 and 1.3 of the Commission's Rules, 47 C.F.R. §§ 0.331 and 1.3, that Section 80.453 of the Commission's Rules, 47 C.F.R. § 80.453, IS WAIVED and modification of public coast station license WCM submitted by the Ohio River Corporation to serve land mobile vehicles on a secondary basis is authorized,

[1] *See, e.g., In the Matter of Global Communications, Inc.*, 7 FCC Rcd 2238 (1992), *In the Matter of Custard, Inc. Request for waiver of Section 80.453 of the Rules to permit public coast station KFN to serve mobile vehicles on land*, 7 FCC Rcd 4515 (1992), *In the Matter of Request for waiver of the requirements in Section 80.453 of the Rules to permit public coast station WHU638 to serve mobile vehicles on land*, 8 FCC Rcd 3061 (1993).

subject to the conditions set forth herein and subject to the condition that not impairment or interference is caused to maritime communications services.

FEDERAL COMMUNICATIONS COMMISSION

Robert H. McNamara
Chief, Special Services Division

Before the
Federal Communications Commission
Washington, D.C. 20554

PUBLIC NOTICE

Released: August 11, 1993

NYNEX FILES COST ALLOCATION MANUAL REVISIONS RELATED TO PROPOSED VIDEO DIALTONE TRIAL

PUBLIC COMMENT INVITED

On August 2, 1993, NYNEX Telephone Companies filed proposed revisions to their cost allocation manual (CAM) for the separation of regulated and nonregulated costs. In these revisions NYNEX makes changes related to its Video Dialtone Trial which was authorized by the Commission in an order released June 29, 1993 (FCC 93-302).

Parties may file comments on the proposed revisions to the NYNEX CAM no later than **September 9, 1993.** Replies should be filed by **September 24, 1993.** Comments should reference AAD 93-92. A copy of each pleading should be sent to Alicia Dunnigan, FCC, Common Carrier Bureau, 2000 L Street, N.W., Room 812, Washington, D.C. 20554 and the International Transcription Service (ITS), 2100 M Street, N.W., Suite 140, Washington, D.C. 20037, (202) 857-3800. Copies are available for public inspection and copying in the Accounting and Audits Division public reference room, 2000 L Street, N.W., Room 812, Washington, D.C. Copies are also available from ITS.

For further information contact Alicia Dunnigan at (202) 634-1861.

FEDERAL COMMUNICATIONS COMMISSION

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 93-225

In the Matter of

Amendment of Part 73 of the
Commission's Rules to Clarify
the Definition and Measurement
of Aural Modulation Limits in the
Broadcast Services

NOTICE OF INQUIRY

Adopted: July 23, 1993; Released: August 12, 1993

Comment Date: November 5, 1993
Reply Comment Date: December 15, 1993

By the Commission:

INTRODUCTION

1. The purpose of this *Inquiry* is to explore the Commission's rules and policies that relate to the definition and measurement of aural modulation[1] limits. Having appropriate limits on modulation, or on the emitted sidebands resulting from modulation, is essential to controlling adjacent channel interference levels. Although the discussion herein focuses principally on the measurement of FM modulation, we welcome comments addressing aural modulation measurement in the AM and TV services.

BACKGROUND

2. Limits on station aural modulation traditionally have been considered among the most important of the Commission's technical standards due to their direct effect on the quality of radio service.[2] Maximum and minimum levels of aural modulation are specified in Section 73.1570 of the Commission's Rules for the broadcast services and are intended to ensure that a quality signal is available throughout the service area. In general, our rules require that loud program material modulate the transmitter at least 85% to ensure reasonable consistency among broadcast stations.[3] However, as a practical matter, undermodulation is seldom a problem in the broadcast services and is not an issue in this proceeding.

3. Limits on aural overmodulation serve a variety of purposes. First, they help to insure that excessive sideband energy is not generated, which could exacerbate adjacent channel interference levels. In the case of AM stations, the limit on positive peak modulation limits the average power to an extent consistent with the authorized carrier power; the limit on negative peak modulation controls distortion. Also, many AM broadcast transmitters handle large negative peaks in a nonlinear fashion and produce out of band emissions when negative peaks near or above 100% are encountered. In the television service, the limits serve to prevent degradation of the video signal and minimize adjacent channel interference in cable TV systems. In receivers, which are designed to receive signals with certain predetermined characteristics, modulation limits help prevent distortion. This *Notice of Inquiry* principally will examine the subject of aural modulation and to a lesser extent, the subject of aural station bandwidth and emission, inasmuch as bandwidth and emission standards are derived primarily from the study of modulation and to a lesser degree, power.[4]

4. Prior to 1983, FM licensees were required to monitor their stations' modulation using modulation monitors authorized by the Commission under its type-approval procedure.[5] Such equipment was required to embody certain design characteristics specified in Section 73.332 of the Commission's Rules (Requirements for type approval of FM modulation monitors). However, as a result of action taken in MM Docket No. 81-698,[6] Section 73.332 was deleted and type approval of modulation monitors was no longer required, nor were modulation monitors. Other rules also were eliminated or modified to give licensees more flexibility in measuring modulation. However, the rules limiting modulation were left essentially unchanged.

5. Section 73.1570 limits FM modulation levels, stating that "the total modulation must not exceed 100 percent on peaks of frequent reoccurrence referenced to 75 Khz deviation."[7] Licensees are free to use whatever methods they wish to ascertain conformance with these requirements. Some continue to use monitors which were type approved by the Commission in earlier years, while others use a

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[1] Modulation is the process by which some characteristic of a radio frequency (RF) signal is varied in accordance with the changes that occur in a program signal. For example, in FM broadcasting the frequency of the RF signal is made to vary by both the audio frequencies and loudness levels present in the voices and music of the program material. Similarly, in AM broadcasting the program source causes variations in the amplitude of the RF signal. All forms of modulation generate energy in "sidebands" which surround the main carrier. Modulation that exceeds our standards can cause excessive sideband energy, which can interfere with the reception of signals on adjacent channels.

[2] Other fundamentally important operational standards regulate power, frequency stability and out-of-band and spurious emissions.

[3] An exception to this requirement is made to avoid objectionable loudness or to maintain the dynamic range of program material. *See* Section 73.1570(a).

[4] Emission limitations often incorporate a power dependent term to limit harmonic and spurious emissions (emissions outside the authorized bandwidth).

[5] Under type-approval, the Commission tested the modulation monitors to ensure that they complied with the standards in Sections 73.50 (for AM), 73.332 (for FM) and 73.694 (for TV).

[6] *See Report and Order* in BC Docket No. 81-698, 54 RR 2d 435 (1983), 48 Fed. Reg. 36459, August 11, 1983.

[7] An exception is made for FM stations using subcarriers to provide subsidiary communications services, where somewhat greater modulation and deviation are permitted. Stations providing subcarrier services may transmit with peak modulation up to 110%, which is equivalent to 82.5 Khz deviation. We understand that some broadcasters are misinterpreting this pro-

variety of newer devices employing sophisticated circuits which can be adjusted to respond to or ignore modulation peaks of different intensities and durations. Thus, while some modulation monitors may conform to the standards formerly specified for type approval of modulation monitors, they can be adjusted so as to give differing indications for the same transmissions.

6. Many broadcast station licensees choose to keep their average modulation levels as high as possible in order to keep their signal above noise at the limits of their service areas and to attract the attention of listeners who are tuning across the dial.[8] To achieve this objective, licensees use audio signal processing devices that automatically compress the dynamic range of the original program. That is, the quiet passages of music are increased in volume and the very loud passages are suppressed. When used correctly, this improves the listenability of the program, particularly for automobile reception where high surrounding noise levels could exceed low volume program passages. When used to excess, the result is uniformly loud music with little discernible dynamic range and a "flat" quality. Some licensees, by using monitors which disregard very brief or infrequent bursts of high modulation, find they need employ only moderate audio compression to attain reasonably high modulation levels. This approach preserves more of the dynamic range inherent in live music.

7. The marketing of monitors which give different indications is the catalyst for this reexamination of modulation measurement. Some equipment suppliers believe that no modulation in excess of 100% should be permitted. Others, due to differences in interpreting previous FCC rules relating to modulation monitor type approval and automatic transmission system monitoring, have concluded that occasional modulation peaks of very short duration exceeding 100%[9] or occurring infrequently (i.e., less than 10 per minute)[10] do not contribute to interference to adjacent channel stations. The resulting differences in modulation monitor operation can result in significant variations in loudness from one station to another and possibly, differing opinions in the industry regarding compliance with our modulation rules.[11]

8. As the foregoing discussion demonstrates, there is some confusion over what constitutes overmodulation and how it should be measured. Another difficulty is that the methods of modulation measurement used by broadcasters differ from that used by our staff in the Field Operations Bureau (FOB). The most common circuitry in the newer monitors detects peak deviation levels exceeding a user specified level (usually 100%) and flashes a warning light. Our personnel, on the other hand, usually monitor broadcasts by connecting an oscilloscope to an FM receiver's discriminator and calibrating it to display deviation in excess of the legal limit. This basic method is the same one that was used when the Commission mandated type-approved modulation monitors. The different methods can lead to different conclusions which have consequences for broadcasters.[12] All of these factors warrant examination and, if necessary, clarification by the Commission to ensure a proper and uniform understanding of their responsibilities by all licensees.

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vision by assuming that the mere presence of subcarriers permit increasing modulation to 110%. The rule requires that the total modulation may be increased over 100% in the amount of a half of a percent for each one percent of subcarrier modulation injection, up to a maximum of 110%. Thus, only if 20 percent subcarrier modulation was used at an FM station, could the total modulation be increased to 110%. This exception is permitted so that stations providing subcarrier services do not have to sacrifice the competitive loudness of their broadcast programming.

[8] We are aware that the "loudness" of an FM station depends principally on the modulation level and the audio compression used, and that station revenues often depend on being heard over as wide an area as possible. However, the bandwidth occupied by an FM signal is a direct function of its level of modulation and the mix of modulating frequencies, and all licensees must stay within their assigned channels in order to assure that interference levels will remain within designed limits.

[9] The former Section 73.332 required that the peak preset indicator light, usually set to flash when modulation exceeded 100%, respond to tone bursts occurring at repetition rates from one to ten "bursts" per second. A "burst" consisted of: Ten consecutive cycles of a constant amplitude 10 kHz sinusoid (a 1 millisecond tone burst) and five consecutive cycles of a constant amplitude 1 kHz sinusoid (a 5 millisecond tone burst). This indicator was required for FM modulation monitors designed for use at stations transmitting stereophonic and/or subcarrier signals *only* (but *not* monophonic FM signals). Because sensitivity to the one millisecond tone burst is more demanding than responding to a 5 millisecond burst, and because nearly all FM stations today transmit stereophonic signals (many with additional subcarriers), a "1 millisecond response" characteristic has continued to be used as an equipment design standard by some manufacturers of modulation monitors. However, current rules do not require the use of this test procedure.

[10] Former Section 74.342 contained special rules pertaining to modulation monitoring and control devices used at stations under automatic transmitter control. Section 73.342(a) permitted no more than 10 bursts of modulation per minute in excess of 100%. For the purposes of this requirement, a sequence of repetitive instances of modulation exceeding the prescribed limits occurring within a single 5 millisecond interval was to be considered as one burst. However, this rule was never invoked by the Commission as comprising a general definition of the term "peaks of frequent reoccurrence." Nevertheless, it has been used as such a definition by some modulation monitor manufacturers.

[11] A case in point occurred several years ago when a well-known equipment manufacturer marketed a state-of-the-art television stereo modulation monitor which could detect overmodulation transients as short as several microseconds. Traditional modulation monitors only detected and indicated peaks that had a much longer duration. Engineers using the more sensitive monitor noticed that when their stations' operating parameters were set using this device, their average modulation (i.e., the loudness of their TV stations' aural signals) was noticeably less than that of stations using older monitors. Attempts to resolve the discrepancy between traditional versus state-of-the-art methods of modulation measurement were unsuccessful. Ultimately, an electronic "correction" was made to the new monitor to make its indications match more closely those of modulation monitors made by other manufacturers.

[12] However, we note from our enforcement experience that instances of overmodulation do not commonly involve borderline judgments; stations which overmodulate tend to do so in an egregious manner which is apparent from any measurement method used.

THE INQUIRY

9. We seek comments on two basic issues: (1) What should be the definition of overmodulation (including whether new emission limitations should be adopted in lieu of an overmodulation standard); and (2) What methods or procedures are necessary to implement any proposed limits on modulation levels.

10. *Definition of overmodulation.* As noted above, the current definition of permissible modulation sets out frequency deviation limitations and states that these limitations must not be exceeded by "peaks of frequent reoccurrence." No definition of this phrase is given in the rules. Should this rule remain unchanged, or should it be modified or interpreted with more specificity? In particular, should consideration be given to the amplitude of the modulation peaks beyond 100%, to the time duration of such peaks, or to the number of peaks within a given span of time? Experience indicates that a few overmodulation peaks per minute can be tolerated without causing perceptible adjacent channel interference. Such peaks may even be unavoidable if a station seeks to promote fidelity and a natural dynamic range without excessive signal processing. Thus, while some engineers might argue that no overmodulation should be tolerated, such a rigid rule could pose considerable problems with respect to compliance. Therefore, we seek information on what maximum peak overmodulation amplitude, frequency or duration (or some defined interrelationship between these three parameters) should be considered overmodulation capable of causing harmful adjacent channel interference.[13] We also note that theory tells us that peaks of very short duration result from high bandwidth baseband signals and can result in excessive sidebands for reasons other than overmodulation. Are there other relevant modulation parameters which should be considered as well? We request that commenters consider submitting empirical or theoretical data to support their views in this area.

11. We also wish to examine a different approach to resolving the overmodulation issue. Namely, should we eliminate specific limits on modulation *per se* and replace them with a new emission limitation (or standard) designed to prevent harmful adjacent channel interference? Traditionally, emission limitations have taken the form of "step-function" formulas relating transmitter output power to transmitter bandwidth, with permissible power dropping in steps as the bandwidth increases. These "step function" limitations, however, were developed decades ago, are extremely simplistic approximations of signal envelopes and, for this reason, do not afford adequate adjacent channel protection. However, in recent years more sophisticated versions of these limits have been developed which use continuous power "roll-off" formulas derived from Bessel function analysis. These newer emission standards provide a readily quantifiable degree of adjacent channel protection. It may be possible to develop analogous formulas for FM and TV aural signals which could replace the current modulation limits and avoid the definitional problems inherent in the current regulations.

12. For example, in the 1970s, Motorola, Inc. requested that the Commission amend the rules in the private land mobile services to provide for the use of what is popularly called F3Y ("digitized voice") emission.[14] This led to the development of a new emission limitation, custom-tailored to permit digital modulation without significantly increasing adjacent channel interference.[15] The new emission standard became the primary means of limiting adjacent channel interference, while providing land mobile licensees with considerable flexibility in using digital modulation. The same standard recently was adopted for use in the Remote Pickup Broadcast Service.[16]

13. In addition, the Commission recently adopted in MM Docket No. 88-376, a new emission limitation for AM broadcast stations.[17] This new emission standard is intended to reduce levels of adjacent channel interference in the AM service while giving licensees considerable flexibility in program audio signal processing. While modulation limits in the AM service were retained, their practical function is

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[13] Generally, discussions on overmodulation have not focused on the degree or percentage of overmodulation. Usually, individuals debate whether peaks of less than 1 millisecond duration are inconsequential, and whether a small number of peaks (such as less than 10) within a one-minute period are significant.

[14] F3Y was the original emission designator for "digitized voice modulation." To conform with current International Telecommunications Union (ITU) specifications, it should now be termed F1E (frequency modulated single-channel digital telephony) or G1E (phase modulated single-channel digital telephony) emission. However, the old terminology persists and is used in Sections 74.462 and 74.482 of the Commission's Rules. For the sake of consistency, we will use F3Y here to refer to the F1E and G1E emissions. The signal comprising this emission was incompatible with the low pass audio filtering requirements that, along with modulation limits, were the principal means of preventing adjacent channel interference at that time. There was (and still is) a very broad emission limitation specified for land mobile transmitters but its adequacy was questioned. (Whereas normal voice emissions fell far below the emission limits, the F3Y emission, containing a higher than normal fundamental modulating frequency with attendant harmonics, approached it much more closely.) This created the need for a more exact emission limitation for digital modulation.

[15] *See First Report and Order* in Docket No. 21142, 42 RR 2d 355 (1978) and *Second Report and Order* in Docket 21142, 46 RR 2d 937 (1979). The emission limitation developed in that proceeding was based on a Bessel function analysis of the emitted signal based on the use of a low-pass audio filter to attenuate high frequency components of the modulating signals. The low-pass filter requirements were deleted for transmitters which comply with this derived emission limitation. Its efficacy in preventing adjacent channel interference was proven by over-the-air tests conducted at the time and have since been confirmed by years of operating experience.

[16] *See Report and Order*, MM Docket No. 90-499, adopted May 22, 1991, released June 11, 1991, 56 Fed. Reg. 28497, June 21, 1991.

[17] *See Notice of Proposed Rule Making* in MM Docket No.

to limit the average transmitter output power.[18] The new emission limit is controlling with respect to limiting interference caused by excessive sidebands.[19]

14. Inasmuch as a station's total power output does not change with modulation in the case of FM and TV aural transmitters, it is possible that appropriate emission limitations could be developed for those stations which could render specific limits on modulation unnecessary. The rationale for this approach would be that the interference potential of these transmitters is determined by their occupied bandwidth. Therefore, a carefully defined limit on occupied bandwidth could be effective in preventing interference and give licensees more flexibility in audio processing as well as the use of multiplexed subcarriers.

15. However, signals broadcast by FM and TV aural transmitters are much more complex than those typically transmitted in the land mobile services and in AM broadcasting. Comment is requested on whether anyone has developed mathematical models for FM or TV aural multiplex signals. Should there be uncertainties or disagreement over how such a task should be approached, an empirical approach may provide the solution. Radiated emissions of FM and TV aural transmitters transmitting different kinds of programming and multiplexed subcarriers could be measured using spectrum analyzers to develop an emission profile that would accommodate all current transmission system configurations not deemed to cause more than the normally expected amount of adjacent channel interference. Comment is requested on the desirability of developing more precise emission limitations for FM and TV aural transmitters, and whether an analytic or empirical approach would be preferable.

16. *Instrumentation.* In MM Docket No. 81-698, referenced above, the Commission deleted the requirement that the modulation monitoring equipment used by each station be FCC type approved. This deregulatory action was meant to provide licensees with some flexibility in achieving compliance with modulation limits and to eliminate a burden (equipment authorization) on equipment suppliers and the Commission. It was not meant to excuse licensees from using whatever means were necessary to ensure compliance with the modulation limits. This will continue to be the case if the current modulation limits are retained or revised, i.e., we do not expect to type approve monitoring equipment or specify what type of equipment licensees should employ to maintain their compliance with any modulation limits that may emerge from this rulemaking.

17. It is possible that the equipment needed to determine compliance with emission limitations may be more expensive than that used to make traditional modulation measurements.[20] We seek information on what equipment would be required, its costs, and the skills needed to operate it properly. If the emission limitation approach is adopted, what devices (other than spectrum analyzers) would be suitable for detecting excessive bandwidth?[21] We note that even the use of such devices may not eliminate some of the problems facing the current generation of modulation monitors, because a limit may be necessary on the time duration and recurrence rate of peak tolerable out-of-band power. Lastly, if we adopt new emission limitations, should we continue to allow the use of conventional modulation monitors as an alternative?[22]

SUMMARY

18. In this proceeding we seek to obtain information that will enable us accurately to set meaningful modulation limits on peak amplitude, peak duration, peak recurrence rates and the time interval over which the peaks are to be counted. Finally, we wish to examine an alternative concept -- that emission limitations can replace modulation limitations. We seek information on this concept's application to modulation, modulation measurement, the control of interference and its implications for broadcasters, equipment manufacturers and the Commission's enforcement efforts.

Procedural Matters

19. This Notice of Inquiry is issued pursuant to authority contained in Sections 4(i), 303 and 403 of the Communications Act of 1934, as amended. Pursuant to applicable procedures set forth in Sections 1.415 and 1.419 of the Commission's Rules, 47 CFR 1.415 and 1.419, interested parties may file comments on or before **November 5, 1993**, and reply comments on or before **December 15, 1993**. All relevant and timely filed comments will be considered by the Commission before taking further action in this proceeding. To file formally in this proceeding, participants must file an original and four copies off all comments, reply comments and supporting documents. If participants want each Commissioner to receive a personal copy of their comments, an original and nine copies must be filed. Comments and reply comments should be sent to the Offices of the Secretary, Federal Communications Commis-

88-376, 3 FCC Rcd 5687, 1988 , *Report and Order* in MM Docket No. 88-376, 4 FCC Rcd 3835 (1989) and *Memorandum Opinion and Order* in MM Docket No. 88-376, 5 FCC Rcd 2598 (1990).

[18] The nature of amplitude modulation limits acceptable negative modulation to 100% if significant signal distortion is to be avoided. Section 73.1570(b)(1) limits positive peak modulation to 125%. This permits licensees to take advantage of asymmetries in human speech waveforms without increasing the average output power to the point where co-channel or adjacent channel interference would occur.

[19] We note that the existing FM broadcast emission standards in Section 73.317 may be ambiguous with respect to actual signals since the measurement resolution bandwidth is not specified. By contrast it is specified in the corresponding AM standard in Section 73.44.

[20] Broadcasters should note that our final decision adopting the new emission limitation in MM Docket No. 88-376 gave little weight to such a possibility, since nothing prohibits licensees from sharing more expensive measurement equipment, or subscribing to over-the-air monitoring services, or depending on their consulting engineers to provide necessary equipment measurement capabilities.

[21] About the time the new AM emission was adopted, a so-called "splatter monitor" (a homodyne receiver followed by a high pass filter) was marketed for slightly over $2000. Essentially, it measures all out of authorized emission bandwidth power. Depending upon the capabilities provided, spectrum analyzers cost five to ten or more times as much. Similarly less expensive emission monitoring equipment may be possible for FM and TV use.

[22] In MM Docket No. 88-376, we permitted AM licensees to omit periodic measurements to determine compliance with the then-developed emission limitations for a period of 5 years, provided they installed audio equipment that conformed to the ANSI NRSC-1 specifications (*see* Section 73.44(e)) and further provided there was no other evidence of non-compliance.

sion, Washington D.C., 20554. Comments and reply comments will be available for public inspection during regular business hours in the FCC Reference Center (Room 239) of the Federal Communications Commission, 1919 M Street N.W., Washington D.C., 20554. For further information contact James E. McNally, Jr., Engineering Policy Branch, Policy and Rules Division, Mass Media Bureau, Federal Communications Commission, Washington D.C., 20554, telephone (202) 632-9660.

FEDERAL COMMUNICATIONS COMMISSION

William F. Caton
Acting Secretary

Before the
Federal Communications Commission
Washington, D.C. 20554

GC Docket No. 92-52

In the Matter of

Reexamination of the Policy	RM-7739
Statement on Comparative	RM-7740
Broadcast Hearings	RM-7741

FURTHER NOTICE OF PROPOSED RULEMAKING

Adopted: July 19, 1993; Released: August 12, 1993

Comment Date: September 13, 1993
Reply Date: September 28, 1993

By the Commission:

I. INTRODUCTION

1. In this notice, we propose to amend 47 C.F.R. § 73.3597(a)(1) to require that successful applicants in comparative proceedings operate their stations for three years before they would become eligible to transfer them. This action would supersede the current requirement that such stations be held for one year.

II. BACKGROUND

2. We initiated this proceeding to reform the criteria used to select among mutually exclusive applicants for new broadcast facilities. *Reexamination of the Policy Statement on Comparative Broadcast Hearings*, 7 FCC Rcd 2664 (1992). We noted that these criteria had not been comprehensively examined for 27 years and that changes in the broadcast marketplace, in broadcast technology, and in the Commission's regulatory policies for broadcasting now warranted reexamination of the criteria. *Id.* at 2664 ¶ 2.

3. Among the proposals that we put forth for comment was adoption of a novel comparative criterion called the "service continuity preference." 7 FCC Rcd at 2668 ¶ 28.[1] Under the service continuity preference, applicants proposing to own and operate their stations for at least three years would receive specific comparative credit. That proposal was made in response, *inter alia*, to concerns about the impact on the comparative process of changes in the Commission's policies regarding the transfer of broadcast stations.

4. For many years, under the "three-year" or "anti-trafficking" rule, the Commission prohibited -- with narrow exceptions -- the transfer or assignment of a broadcast station that had not been operated by its licensee or permittee for at least three years. *See* 47 C.F.R. § 73.3597(a) (1982). *See also Procedures on Transfer and Assignment Applications*, 32 FCC 689 (1962). In 1982, the Commission found that the three-year rule no longer served the public interest, and repealed it. *Transfer of Broadcast Facilities*, 52 RR 2d 1081 (1982), *recon. granted in part*, 99 FCC 2d 971 (1985).[2] Nonetheless, the Commission concluded, for reasons apart from those underpinning the former three-year rule, that in some circumstances restrictions on the transferability of stations were appropriate to protect the integrity of the Commission's processes. *Id.* at 1089-90 ¶ ¶ 34-35. Thus, the Commission imposed a one-year holding requirement on stations awarded in comparative proceedings, generally precluding their immediate resale. *Id.*; 47 C.F.R. § 73.3597(a)(1) (1992).

5. In the NPRM, we proposed that awarding comparative credit to applicants that voluntarily undertake to hold their stations for three-years would offer a benefit to the public in addition to that provided by the one-year holding requirement of 47 C.F.R. § 73.3597(a)(1). 7 FCC Rcd at 2672 n.12. We suggested that such credit would extend the public interest benefits of choosing licensees in the comparative process, would discourage potential abuse of the comparative process, and would prevent disruption of service. *Id.* at 2668 ¶ 28.

6. Although we proposed that the service continuity preference would supplement rather than supersede the holding requirement of 47 C.F.R. § 73.3597(a)(1), we invited commenters to address whether the rationale of the service continuity preference would warrant our applying it to all new licensees selected through the comparative hearing process. 7 FCC Rcd at 2672 n.12. *See also* Separate Statement of Commissioner Ervin S. Duggan, 7 FCC Rcd at 2672.

III. DISCUSSION

7. Our review of the comments, as well as our own concerns, now lead us to the view that the proposed preference is not an adequate means of fully promoting the public interest benefits of service continuity. Rather, it appears that a mandatory three-year service continuity requirement should apply to all successful applicants in comparative proceedings. We now review the factors that lead us to this conclusion.

A. COMMENTS

8. The commenters uniformly supported our proposal to foster service continuity. They assert that making provision for service continuity will discourage speculators, lead to more realistic proposals, and encourage investment in quality programming and commitment to the community. *See* Comments of Capital Cities/ABC, Inc. at 13-15; The National Association of Broadcasters at 11-12.

9. Moreover, several of the commenters favor the alternative of amending the one-year rule to apply a longer restriction to all successful applicants in comparative proceedings -- not merely to those who claim a service con-

[1] In the NPRM, we stated that: "In view of the scope of the changes proposed in this notice, we may decide, in later action in this proceeding, to sever one or more of the issues raised herein for separate resolution." 7 FCC Rcd at 2671 n.6.

[2] Subsequently, the Commission rejected petitions seeking to initiate a rulemaking to reinstate the anti-trafficking rule. *See Office of Communication of the United Church of Christ v. FCC*, 911 F.2d 813 (D.C. Cir. 1990).

tinuity preference.[3] These commenters argue that a mandatory service continuity requirement would more effectively protect the integrity of the comparative process because it would apply uniformly. According to these commenters, the effectiveness of a voluntary preference would either be "hit or miss" or, alternatively, would merely represent the backhanded imposition of a mandatory requirement, since virtually all applicants would seek a preference. *See* Comments of American Women in Radio and Television, Inc. at 5; Arnold Broadcasting Company at 8-9; Black Citizens for a Fair Media *et al.* at 2-5; Contemporary Communications at 3-4; The National Association for the Advancement of Colored People and the League of United Latin American Citizens at 22-23; Women in Communications, Inc. *et al.* at 4 n.2; The National Association of Black Owned Broadcasters, Inc. Reply at 3-4; Michael J. Wilhelm Reply at 2, 6-7.[4]

10. The record before us indicates that the public interest would be better served by a longer mandatory holding period for comparative authorizations. We find that the public interest benefits of granting authorizations to those applicants with superior comparative attributes would be enhanced if the public were assured of service from those favored applicants for a longer period of time. Moreover, we find that a longer mandatory holding period would serve to safeguard the comparative process from applicants with ill-considered or insincere proposals. Such applicants would face the added burden of effectuating their proposals under potential Commission scrutiny for more than just one year. Applicants with no serious interest in effectuating their proposals and intending to sell after one year to make a quick profit would lose that opportunity. These factors amply support adoption of a longer mandatory holding period. Consequently, we propose to amend 47 C.F.R. § 73.3597(a)(1) to increase the holding period from one to three years for all successful applicants in comparative proceedings. Thus, whereas, in *Transfer of Broadcast Facilities*, 52 RR 2d at 1090 ¶ 16, we concluded that the public interest benefits of the comparative process would be enhanced by a "brief" one-year holding period, the commenters have persuaded us that these public interest benefits would be further enhanced by a longer, three-year period.[5]

B. SUBSIDIARY MATTERS

11. Although the comments already filed provide significant discussion of this matter, we believe we would be assisted by further comments on a number of related questions.

12. *Time period.* In adopting the original anti-trafficking rule, the Commission noted that Congress had limited broadcast license terms to a maximum of three years. *Procedures on Transfer and Assignment Applications*, 32 FCC at 690-91. In 1981, however, Congress extended the statutory license terms to five years for television and seven years for radio. *See* [1981] U.S. CODE CONG. & ADMIN. NEWS 396, 1257. Thus, we ask whether three years remains the relevant period for purposes of service continuity. In this regard, it is our initial view that the Commission's long experience with the former three-year rule provides sufficient indication of its efficacy and benefits to conclude that a three-year provision is an appropriate restriction despite the change in the license terms.

13. *Settlements.* Currently, the holding requirement of 47 C.F.R. § 73.3597(a)(1) applies only to facilities awarded pursuant to a decision on the merits in comparative proceedings and not to grants made pursuant to settlements in those proceedings. *See Pan Pacific Television, Inc.*, 3 FCC Rcd 6629, 6631 ¶ ¶ 13-14 (1988). Recently, the Commission modified its policies to require applicants to adhere to proposals regarding the divestiture of outside media interests, the integration of ownership and management, and active/passive ownership structure made in comparative proceedings despite settlements unless expressly relieved of that obligation by the presiding judge. *Proposals to Reform the Commission's Comparative Hearing Process*, 6 FCC Rcd 157, 159-60 ¶ ¶ 18-22, 162 ¶ 34 (1990), *recon. granted in part*, 6 FCC Rcd 3403 (1991). *See* 47 C.F.R. § 73.1620(g). In view of this change in policy, we ask whether the service continuity requirement of 47 C.F.R. § 73.3597(a)(1) should also apply to authorizations granted pursuant to settlements.

14. *Reporting Requirement.* In connection with the policy change noted in the previous paragraph, the Commission's rules now require successful applicants in comparative proceedings to report any deviations from their divestiture, integration, and passive/active ownership proposals in their application for a license to cover their construction permit and on the first anniversary of the commencement of program tests. 47 C.F.R. § 73.1620(g). We seek comment as to whether a modification of the service continuity requirement would warrant a change in the number and timing of the reports to be made under that rule.

15. *Applicability.* In the NPRM, we proposed to apply changes to the comparative criteria made in this rulemaking proceeding only to applicants not yet designated for hearing as of the effective date of the pertinent action. 7 FCC Rcd at 2669 ¶ 41. In so doing, we sought to

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[3] The views expressed by the commenters are similar to concerns raised by the Court of Appeals as to whether the one-year holding requirement of 47 C.F.R. § 73.3597 is sufficient to protect the integrity of the comparative process. *See Bechtel v. FCC*, 957 F.2d 873, 880 (D.C. Cir. 1992), where the court remanded an adjudicatory proceeding for consideration of an argument that requiring only a one-year holding period appeared to "eviscerate" the basis for awarding credit for the integration of ownership and management.

[4] Although the comments provide ample support for a finding that a longer holding period would serve the public interest, we note, in passing, that none of the commenters submitted empirical data with their comments. Accordingly, we wish to give the commenters an additional opportunity to submit relevant empirical data in response to this further notice. In particular, data on the turnover rate of stations acquired in the comparative hearing process (especially within one year of operation or shortly thereafter) may be of interest.

[5] This proposal does not affect aspects of 47 C.F.R. § 73.3597(a)(1) that pertain to the treatment of transfers or assignments pursuant to the Commission's Minority Ownership Policy. In addition, our analysis raises the related but distinct question of whether there is reason to reinstitute some form of anti-trafficking rule applicable to all facilities. Because this question goes beyond the scope of this proceeding -- and beyond the rationale for amending 47 C.F.R. § 73.3597(a)(1) -- we will not consider it in this proceeding. So as not to ignore this matter, however, we request comment as to whether a new proceeding should be opened to explore this issue.

avoid prejudice resulting from the detrimental reliance on the current comparative factors by applicants whose proposals might be rendered inferior by changes in policy. We also sought to avoid the expensive and time-consuming need to relitigate cases already decided. *See Anchor*, 7 FCC Rcd at 4568 ¶ 22.

16. These considerations do not appear relevant to the proposal made here, since this proposal does not involve the comparative evaluation of the applicants. Moreover, the immediate application of a longer service continuity requirement would maximize its effectiveness. Accordingly, we propose to apply the new service continuity requirement to all existing and future authorizations. We seek comment on this proposal.

C. QUESTIONS FOR COMMENT

17. In view of the foregoing, we seek comment on the following questions:

(a) Whether the one-year holding period specified in 47 C.F.R. § 73.3597(a)(1) should be increased to three years (or more) for successful applicants in comparative proceedings.

(b) Whether the holding requirement of 47 C.F.R. § 73.3597(a)(1) should apply to authorizations granted pursuant to settlements in comparative proceedings.

(c) Whether and how the reporting requirements of 47 C.F.R. § 73.1620(g) should be amended in light of any modification in the required holding period.

(d) Whether an increase in the holding period should be applicable to all existing and future authorizations obtained through the comparative process.

(e) Whether the Commission should initiate a proceeding to inquire whether service continuity requirements should be imposed with respect to facilities acquired other than through the comparative hearing process.

IV. PROCEDURAL MATTERS

A. EX PARTE RULES -- NON-RESTRICTED PROCEEDING

18. This is a non-restricted notice and comment rulemaking proceeding. *Ex parte* presentations are permitted, except during the Sunshine Agenda period, provided they are disclosed as provided in the Commission rules.

B. REGULATORY FLEXIBILITY ACT

19. An Initial Regulatory Flexibility Analysis is set forth in 7 FCC Rcd at 2671.

C. AUTHORITY

20. Authority for this rulemaking action is contained in 47 U.S.C. §§ 154(i), 154(j), 303(r), 309(g), 309(i), 403.

V. ORDERING CLAUSES

21. ACCORDINGLY, IT IS ORDERED, That NOTICE IS HEREBY GIVEN of the proposed regulatory changes described above, and that COMMENT IS SOUGHT on these proposals.

22. IT IS FURTHER ORDERED, That pursuant to applicable procedures set forth in sections 1.415 and 1.419 of the Commission's Rules, comments SHALL BE FILED on or before **September 13, 1993** and reply comments SHALL BE FILED on or before **September 28, 1993**. To file formally in this proceeding, commenters must file an original and four copies of all comments, reply comments, and supporting comments. If commenters want each Commissioner to receive a personal copy of their comments, they must file an original plus nine copies. Comments and reply comments should be sent to Office of the Secretary, Federal Communications Commission, Washington, D.C. 20554. In addition, commenters should file a copy of any such pleadings with the Office of General Counsel, Room 610, 1919 M Street, N.W., Washington, D.C. 20554. Comments and reply comments will be available for public inspection during regular business hours in the FCC Reference Center, 1919 M Street, N.W., Washington, D.C. 20554.

23. For further information, contact David S. Senzel, (202) 632-7220, Office of General Counsel.

FEDERAL COMMUNICATIONS COMMISSION

William F. Caton
Acting Secretary

Before the
Federal Communications Commission
Washington, D.C. 20554

In re:

Complaint of Northeastern Educational Television of Ohio, against TCI Cablevision of Ohio	CSR-3882-M OH0145

Request for Carriage

MEMORANDUM OPINION AND ORDER

Adopted: August 4, 1993; Released: August 12, 1993

By the Chief, Mass Media Bureau:

1. On July 2, 1993, a petition on behalf of Northeastern Educational Television of Ohio, licensee of Television Broadcast Station WNEO (Educ., Ch. 45), Alliance, Ohio, was filed with the Commission claiming that TCI Cablevision of Ohio ("TCI"), operator of a cable system serving Steubenville, Ohio, had declined to carry the station, even though the Grade B contour of WNEO encompasses the system's principal headend at north latitude 40^0 20' 48" and west longitude 80^0 39' 37" in Steubenville, Ohio, and the reference point for Alliance is also within fifty miles of TCI's headend. WNEO asserts that it is thus a "local" signal within the meaning of Section 5 of the Cable Television Consumer Protection and Competition Act of 1992, Pub. L. No. 102-385, 106 Stat. 1460 (1992), and that it is entitled to mandatory carriage on the TCI system.

2. TCI's only response to WNEO's carriage request was a May 21, 1993 letter detailing its current channel line-up and designating those channels it considers to be must-carry for its Steubenville system. Since this line-up does not include its station, WNEO concludes that this letter constitutes TCI's denial of carriage. WNEO continues, however, that since this same letter indicates that TCI has at least 37 currently-activated channels, TCI is required to carry any and all qualified NCE stations that request carriage, pursuant to Section 5(b)(1) of the 1992 Cable Act. TCI has not filed a response to WNEO's must-carry petition.

3. We agree with WNEO's argument. Section 76.56(a)(iii) of the Commission's Rules requires that all cable systems with more than 36 channels must carry a *minimum* of three NCE channels, but it does not preclude requiring such a system to carry additional NCE channels. Indeed, paragraph 11 of the *Report and Order in MM Docket No. 92-259*, 8 FCC Rcd 2966, 2968 (1993), specifically states: "[s]ystems with a capacity of more than 36 usable activated channels are *generally required* to carry the signals of *all* qualified local NCE stations requesting carriage" (emphasis supplied). The only exception to this requirement is when there is substantial programming duplication between local NCE stations, a circumstance not at issue here.

4. In light of the foregoing, therefore, the complaint filed July 2, 1993 by Northeastern Educational Television of Ohio, Inc. IS GRANTED in accordance with Section 615(j)(3) (47 U.S.C. 535) of the Communications Act of 1934, as amended, and TCI Cablevision of Ohio IS ORDERED to commence carriage of Station WNEO forty-six (46) days from the release date of this *Order*. This action is taken by the Chief, Mass Media Bureau, pursuant to authority delegated by Section 0.283 of the Commission's Rules.

FEDERAL COMMUNICATIONS COMMISSION

Roy J. Stewart
Chief, Mass Media Bureau

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

MCI TELECOMMUNICATIONS CORP. File No. I-T-C-93-201

Application for authority to acquire and operate facilities for direct service between the U.S. and Burkina Faso and Mali.

Application for authority to acquire and operate facilities for direct service between the U.S. and Malta, Mauritania, Togo and Zimbabwe. File No. I-T-C-93-205

ORDER, AUTHORIZATION AND CERTIFICATE

Adopted: July 28, 1993; Released: August 12, 1993

By the Chief, International Facilities Division:

1. Upon consideration of the above-captioned uncontested applications, filed pursuant to Section 214 of the Communications Act of 1934, as amended, IT IS HEREBY CERTIFIED that the present and future public convenience and necessity require the provision of direct service between the U.S. and Burkina Faso, Mali, Malta, Mauritania, Togo and Zimbabwe.[1] by MCI Telecommunications Corporation (MCI).

2. Accordingly, IT IS ORDERED that applications File Nos. I-T-C-93-201 and I-T-C-93-205 ARE GRANTED, and MCI is authorized to:

a. lease from Comsat and operate 48 voice-grade satellite circuits between the Mt. Jackson, Virginia earth station and an appropriate Intelsat satellite over the Atlantic Ocean, connecting with similar circuits between the satellite and earth stations in Malta, Mauritania and Zimbabwe furnished by MCI's correspondents;

b. own and operate 48 voice-grade circuits in the Mt. Jackson earth station to be used in conjuction with the space segment capacity;

c. own and operate 48 voice-grade connecting circuits between the Mt. Jackson earth station and MCI's West Orange, New Jersey operating center;

d. use the facilities in a, b and c above to provide MCI's regularly authorized services between the U.S. and Malta (16 circuits), Mauritania (8 circuits) and Zimbabwe (24 circuits).

e. lease from Comsat and operate 23 voice-grade satellite circuits between the Etam, West Virginia earth station and an appropriate Intelsat satellite over the Atlantic Ocean, connecting with similar circuits between the satellite and an earth station in Burkina Faso, Mali and Togo furnished by MCI's correspondents;

f. lease from AT&T and operate 23 voice-grade circuits in the Etam earth station to be used in conjunction with the satellite space segment capacity;

g. lease and operate 23 voice-grade connecting circuits between the Etam earth station and MCI's West Orange, New Jersey operating center; and

h. use the facilities in e, f and g above to provide MCI's regularly authorized services between the U.S. and Burkina Faso (5 circuits), Mali (10 circuits) and Togo (8 circuits).

3. IT IS FURTHER ORDERED that our authorization of MCI to provide private lines as part of its authorized services is limited to the provision of such private lines only between the United States and any of the points authorized herein -- that is, private lines which originate in the United States and terminate in any of the points authorized herein or which originate in any of the points authorized herein and terminate in the United States. In addition, MCI may not -- and MCI's tariff must state that MCI's customers may not -- connect private lines provided over these facilities to the public switched network at either the U.S. or any of the points authorized herein end, or both, for the provision of international basic telecommunications services, including switched voice services, unless authorized to do so by the Commission upon a finding that any of the points authorized herein affords resale opportunities equivalent to those available under U.S. law, in accordance with *Regulation of International Accounting Rates*, Phase II, First Report and Order, 7 FCC Rcd 559 (1991) *petitions for reconsideration pending*.

4. IT IS FURTHER ORDERED that neither MCI nor any persons or companies directly or indirectly controlling or controlled by MCI, or under direct or indirect common control with it, shall acquire or enjoy any right, for the purposes of handling or interchanging traffic to or from the United States, its territories or possessions, which is denied to any other United States carrier by reason of any

[1] In its application MCI requests authority to acquire and operate facilities for the provision of common carrier services between the United States and Burkina Faso, Mali, Malta, Mauritania, Togo and Zimbabwe and points beyond. We note that should MCI obtain any interest in facilities beyond Burkina Faso, Mali, Malta, Mauritania, Togo and Zimbabwe for the purpose of providing common carrier services, including private line service, between the U.S. and other foreign points, such action would constitute an extension of lines under Section 214 of the Act. Therefore, under the provisions of the Commission's International Competitive Carrier decision, *International Competitive Carrier Policies*, 102 FCC 2d 812 (1985), *recon. denied* 50 R.R. 2d 1435 (1986), it would be necessary for MCI to file additional applications for a certificate of public convenience and necessity under Section 214 to begin service to each additional country and for authority to acquire any facilities needed to provide service to such additional points.

concession, contract, understanding, or working arrangement to which MCI or any persons or companies controlling or controlled by MCI are parties.

5. IT IS FURTHER ORDERED that the applicant shall file a tariff pursuant to Section 203 of the Communications Act, 47 U.S.C. Section 203, and Part 61 of the Commission's Rules, 47 C.F.R. Part 61, for the service authorized in this Order.

6. IT IS FURTHER ORDERED that the applicant shall file the annual reports of overseas telecommunications traffic required by Section 43.61 of the Commission's Rules, 47 C.F.R. §43.61.

7. IT IS FURTHER ORDERED that MCI shall file semi-annual circuit addition reports pursuant to Section 63.15 of the Commission's Rules, 47 C.F.R. §63.15.

8. IT IS FURTHER ORDERED that MCI shall file with the Commission copies of any operating agreements entered into with foreign correspondents within 30 days of its execution, and shall otherwise comply with the filing requirements contained in Section 43.51 of the Commission's Rules, 47 C.F.R. §43.51.

9. The Commission retains jurisdiction over this matter to reallocate circuits in the satellite system among the various international common carriers and other authorized users as required to ensure nondiscriminatory use of, and equitable access to, the communications satellite system.

10. This order is issued under Section 0.291 of the Commission's Rules and is effective upon adoption. Petitions for reconsideration under Section 1.106 or applications for review under Section 1.115 of the Commission's Rules may be filed within 30 days of the date of public notice of this order (*see* Section 1.4(b)(2)).

FEDERAL COMMUNICATIONS COMMISSION

George S. Li
Chief, International Facilities Division
Common Carrier Bureau

Before the
Federal Communications Commission
Washington, D.C. 20554

PUBLIC NOTICE

Released: August 4, 1993

US WEST, TRIANGLE, AND CENTRAL MONTANA FILE JOINT PETITION FOR WAIVER OF STUDY AREA DEFINITION (PART 36 APPENDIX-GLOSSARY) AND PRICE CAP "ALL OR NOTHING" RULE (SECTION 61.41(c) AAD 93-83)

Comment date: September 7, 1993
Reply date: September 28, 1993

On July 23, 1993, US West Communications, Inc. (US West), Triangle Telephone Cooperative Association, Inc. (Triangle), and Central Montana Communications, Inc. (Central) filed a joint petition for waiver of the definition of "study area" as set forth in the Appendix-Glossary of Part 36 of the Commission's rules. This waiver would allow the parties to reflect the changes in their study area boundaries that would result from the sale from US West to Central, a wholly-owned subsidiary of Triangle, of thirteen exchanges in rural central Montana. Central would establish a new study area for these thirteen exchanges. Central and Triangle also seek a waiver of the price cap rules at Sections 61.41(c) and (d) and, if needed, 69.3(e)(11), to exempt them from the price cap "all or nothing" rule and to allow Central to participate as a cost company in the NECA common line and traffic sensitive pools. The parties state that this transaction is currently pending before the Montana Public Service Commission.

Parties may file comments on this petition no later than **September 7, 1993.** Replies should be filed by **September 28, 1993.** Comments should reference AAD 93-83. A copy of each pleading should be sent to Jacqueline Spindler, Common Carrier Bureau, 2000 L Street, N.W., Room 812, Washington, D.C. 20554, and to International Transcription Service (ITS), 2100 M Street, N.W., Suite 140, Washington, D.C. 20037, (202) 857-3800. Copies are available for public inspection and copying in the Accounting and Audits Division's public reference room, 2000 L Street, N.W., Room 812, Washington D.C.; copies are also available from ITS.

For further information contact Jacky Spindler at (202) 634-1861.

FEDERAL COMMUNICATIONS COMMISSION

Before the
Federal Communications Commission
Washington, D.C. 20554

PUBLIC NOTICE

Released: August 4, 1993

US WEST AND RANGE TELEPHONE FILE JOINT PETITION FOR WAIVER OF STUDY AREA DEFINITION (PART 36 APPENDIX-GLOSSARY) AND PRICE CAP "ALL OR NOTHING" RULE (SECTION 61.41(c) AAD 93-84)

Comment date: September 7, 1993
Reply date: September 28, 1993

On July 23, 1993, US West Communications, Inc. (US West) and Range Telephone Cooperative, Inc. (Range), filed a joint petition for waiver of the definition of "study area" as set forth in the Appendix-Glossary of Part 36 of the Commission's rules. This waiver would allow the parties to reflect the changes in their study area boundaries that would result from the sale from US West to Range of a single exchange, Broadus, in rural southeastern Montana. Range also seeks a waiver of the price cap rules at Sections 61.41(c) and (d) and, if needed, 69.3(e)(11), to exempt it from the price cap "all or nothing" rule and allow it to continue to operate as a cost company in the NECA common line and traffic sensitive pools. The parties state that this transaction is currently pending before the Montana Public Service Commission.

Parties may file comments on this petition no later than **September 7, 1993.** Replies should be filed by **September 28, 1993.** Comments should reference AAD 93-84. A copy of each pleading should be sent to Jacqueline Spindler, Common Carrier Bureau, 2000 L Street, N.W., Room 812, Washington, D.C. 20554, and to International Transcription Service (ITS), 2100 M Street, N.W., Suite 140, Washington, D.C. 20037, (202) 857-3800. Copies are available for public inspection and copying in the Accounting and Audits Division's public reference room, 2000 L Street, N.W., Room 812, Washington D.C.; copies are also available from ITS.

For further information contact Jacky Spindler at (202) 634-1861.

FEDERAL COMMUNICATIONS COMMISSION

Before the
Federal Communications Commission
Washington, D.C. 20554

PUBLIC NOTICE

Released: August 4, 1993

US WEST AND MID-RIVERS TELEPHONE FILE JOINT PETITION FOR WAIVER OF STUDY AREA DEFINITION (PART 36 APPENDIX-GLOSSARY) AND PRICE CAP "ALL OR NOTHING" RULE (SECTION 61.41(c) AAD 93-85)

Comment date: September 7, 1993
Reply date: September 28, 1993

On July 23, 1993, US West Communications, Inc. (US West) and Mid-Rivers Telephone Cooperative, Inc. (Mid-Rivers), filed a joint petition for waiver of the definition of "study area" as set forth in the Appendix-Glossary of Part 36 of the Commission's rules. This waiver would allow the parties to reflect the changes in their study area boundaries that would result from the sale from US West to Range of a six exchanges in Montana. Mid-River also seeks a waiver of the price cap rules at Sections 61.41(c) and (d) and, if needed, 69.3(e)(11), to exempt it from the price cap "all or nothing" rule and allow it to continue to operate as a cost company in the NECA common line and traffic sensitive pools. The parties state that this transaction is currently pending before the Montana Public Service Commission.

Parties may file comments on this petition no later than **September 7, 1993.** Replies should be filed by **September 28, 1993.** Comments should reference AAD 93-85. A copy of each pleading should be sent to Jacqueline Spindler, Common Carrier Bureau, 2000 L Street, N.W., Room 812, Washington, D.C. 20554, and to International Transcription Service (ITS), 2100 M Street, N.W., Suite 140, Washington, D.C. 20037, (202) 857-3800. Copies are available for public inspection and copying in the Accounting and Audits Division's public reference room, 2000 L Street, N.W., Room 812, Washington D.C.; copies are also available from ITS.

For further information contact Jacky Spindler at (202) 634-1861.

FEDERAL COMMUNICATIONS COMMISSION

Before the
Federal Communications Commission
Washington, D.C. 20554

PUBLIC NOTICE

Released: August 4, 1993

US WEST AND 3 RIVERS TELEPHONE FILE JOINT PETITION FOR WAIVER OF STUDY AREA DEFINITION (PART 36 APPENDIX-GLOSSARY) AND PRICE CAP "ALL OR NOTHING" RULE (SECTION 61.41(c) AAD 93-86)

Comment date: September 7, 1993
Reply date: September 28, 1993

On July 23, 1993, US West Communications, Inc. (US West) and 3 Rivers Telephone Cooperative, Inc. (3 Rivers) filed a joint petition for waiver of the definition of "study area" as set forth in the Appendix-Glossary of Part 36 of the Commission's rules. This waiver would allow the parties to reflect the changes in their study area boundaries that would result from the sale from US West to 3 Rivers of eleven exchanges in rural western Montana. 3 Rivers also seeks a waiver of the price cap rules at Sections 61.41(c) and (d) and, if needed, 69.3(e)(11), to exempt it from the price cap "all or nothing" rule and allow it to continue to operate as a cost company in the NECA common line and traffic sensitive pools. The parties state that this transaction is currently pending before the Montana Public Service Commission.

Parties may file comments on this petition no later than **September 7, 1993.** Replies should be filed by **September 28, 1993.** Comments should reference AAD 93-86. A copy of each pleading should be sent to Jacqueline Spindler, Common Carrier Bureau, 2000 L Street, N.W., Room 812, Washington, D.C. 20554, and to International Transcription Service (ITS), 2100 M Street, N.W., Suite 140, Washington, D.C. 20037, (202) 857-3800. Copies are available for public inspection and copying in the Accounting and Audits Division's public reference room, 2000 L Street, N.W., Room 812, Washington D.C.; copies are also available from ITS.

For further information contact Jacky Spindler at (202) 634-1861.

FEDERAL COMMUNICATIONS COMMISSION

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

Section 208 Complaints
Alleging Violations of
the Commission's Rate of Return
Prescription for the 1987-1988
Monitoring Period

MEMORANDUM OPINION AND ORDER

Adopted: July 16, 1993; Released: August 13, 1993

By the Commission:

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I. INTRODUCTION

1. The Commission has before it petitions filed by complainants and by several local exchange carrier (LEC) defendants seeking reconsideration and clarification of our action in *Section 208 Complaints Alleging Violations of the Commission's Rate of Return Prescription for the 1987-1988 Monitoring Period (Damages Order)*.[1] In the *Damages Order*, we held that the complainants had met their burden of establishing that the LECs had violated the Communications Act of 1934, as amended, (the "Act") by earning in excess of the Commission's prescribed rate of return in one or more access service categories for the period January 1, 1987 through December 31, 1988.[2] We further held that the complainants were entitled to recover monetary damages from defendants to the extent they could establish that they suffered actual damage as a consequence of the defendants' violations.[3]

2. In addressing the complainants' claims for damages, we found it appropriate to look in the first instance at the difference between the amount the complainants actually paid for defendants' access services during the relevant period and the amount they would have paid if the defendants' rates had produced earnings within the prescribed levels.[4] We concluded, however, that it is proper for the defendants to offset the complainants' damages claims with services from defendants during the relevant period at rates that produced earnings below the Commission's prescribed levels.[5] Thus, defendants were permitted to offset damages claims by showing that they underearned for other access services purchased by complainants during the same period.[6] We also held that the complainants are entitled to prejudgment interest on their damage awards computed at the Internal Revenue Service (IRS) rate for tax refunds.[7]

II. PETITIONS FOR RECONSIDERATION

A. ATC Long Distance Petition

1. Contentions of the Parties

3. In its petition,[8] ATC seeks reconsideration and reversal of that portion of the *Damages Order* which deducted from ATC's award damages awarded to certain ATC subsidiaries.[9] ATC also seeks vacation of that portion of the *Damages Order* directing it to further decrease the damages

[1] 8 FCC Rcd 1876 (1993).
[2] *Id.*, 8 FCC Rcd at 1876, para. 1.
[3] *Id.*
[4] *Id.* at 1883, para. 36.
[5] *Id.* at 1884, para. 43.
[6] *Id.*
[7] *Id.* at 1885, para. 49.
[8] ATC Long Distance (ATC) filed a statement in clarification (ATC Statement) and petition for reconsideration (ATC Petition) on behalf of its member companies. Southern Bell Telephone Company (Southern Bell) did not file an opposition but filed a petition for reconsideration, File No. E-91-74, (Southern Bell Petition) of the Commission's award of damages to certain ATC affiliated companies. We will address Southern Bell's concerns in this section of the order.
[9] We awarded $3,216,426 to ATC from BellSouth, but we reduced ATC's award by the amount of the damages awarded to its affiliated companies that had filed and pursued individual formal complaints against BellSouth. The total reduction was $298,728.

awarded by the amounts the Commission found to be improperly added for companies that ATC had not named in its complaint.[10]

4. ATC states that in the briefing stage of the underlying proceeding, it filed an initial brief that included as Exhibit B a list of all of its subsidiaries and Access Carrier Name Abbreviation (ACNA) codes used by such subsidiaries. According to ATC, it routinely attached Exhibit B to its initial briefs as a tool of convenience for the defendants because Exhibit B set forth the relevant ACNA codes used for the ATC companies.[11] ATC asserts that it did not intend to create the impression that it was seeking damages in each of its complaint proceedings for all of the entities identified in Exhibit B. Instead, ATC maintains that each of the names listed in Exhibit B does not necessarily represent a separate company, but in many cases, simply another name under which a company had an ACNA code. One company could have several ACNAs. In calculating its damages claims, ATC asserts that its figures were based only upon interstate access category purchases from Southern Bell by companies identified in ATC's complaint, none of whom were subsequently added, though as a matter of course, they were listed in Exhibit B.[12] Thus, ATC asks that the Commission reconsider its decision and reinstate the disallowed amounts into ATC's damages award from Southern Bell.

5. Southern Bell did not file an opposition to ATC's petition, but instead filed its own petition seeking reconsideration of, *inter alia*, the Commission's award of damages to ATC. In its petition, Southern Bell argued that a factual dispute exists regarding the damages claimed by ATC that renders it impossible for Southern Bell or the Commission to accurately compute the amount of damages attributable to each of the complainants.[13] According to Southern Bell, the damages awarded to ATC included amounts relating to companies that were not named in ATC's complaint.[14]

2. Discussion

6. After a full review of the record in this and the underlying proceeding, we grant ATC's petition and adjust ATC's award by the amount disallowed. In the underlying proceeding, the record was closed with the filing of the parties' reply briefs, which were filed simultaneously, thus foreclosing ATC's opportunity to respond to Southern Bell's interpretation of ATC's Initial Brief. In the *Damages Order*, we reduced ATC's damage awards by the amounts awarded to ATC's affiliated companies in individual complaints against Southern Bell.[15] Due to the lack of persuasive evidence or further information concerning the entities listed in Exhibit B of ATC's Initial Brief, we further stated that to the extent that ATC included damages for improperly included companies, it must adjust its damage award.[16] We are persuaded by ATC's clarification of the record that its calculations were based solely upon interstate access services purchased by the complainants named in its complaint, File No. E-91-74, and that ATC did not include claims for entities that had filed individual formal complaints against Southern Bell. ATC has filed a timely petition for reconsideration of our *Damages Order* and has clarified the information it had previously provided concerning its damages claims, complete with affidavits attesting the truth of its damage claims. Southern Bell did not file an opposition to the ATC petition nor did it file a response to the ATC Statement. Further, Southern Bell does not dispute that the complainant companies named in the complaint purchased interstate access services from it. Accordingly, we find it appropriate to adjust ATC's award against Southern Bell to include amounts previously disallowed, which totalled $298,728. In light of ATC's clarification that it did not include improperly added companies, we also find that no further adjustments to ATC's damages award from Southern Bell are warranted.

B. LDDS Communications, Inc. Petition

1. Contentions of the Parties

7. LDDS' petition[17] requests that the Commission reconsider its denial of a damages award to LDDS on behalf of three of its subsidiaries, LDDS of Missouri, Inc. (d/b/a/ Com-Link 21), LDDS of Kansas City, Inc. (d/b/a/ Inter-Comm Telephone), and LDDS of Indiana, Inc. (d/b/a/ Telemarketing Communications) (Telemarketing). LDDS contends that, in denying damages awards to the above-named subsidiaries, the Commission relied on Indiana Bell's misinterpretation of Exhibit B of petitioner's initial brief.[18] In that exhibit, LDDS contends that it listed its wholly-owned subsidiaries in the column at the left-hand margin with the trade names of each subsidiary to the

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[10] ATC Petition at 2.

[11] *Id.* at 3-4.

[12] ATC claims damages on behalf of the following companies: TMC of Oklahoma; Advanced Network Systems; American Pioneer Corporation; TTI Lubbock; Transcall; TTI of Midland; AmTel; Satelco; Claydesta Communications; Microtel; TMC of New Orleans; Telus; Datel; Cignal Communications; Suncoast; Claydesta Digital; Long Distance America; National; TTI Midland. ATC maintains that all of these complainants were identified in its complaint against Southern Bell. ATC Statement at 4-5.

[13] Southern Bell Petition at 12.

[14] ATC filed an opposition to the Southern Bell Petition, incorporating by reference its clarification and petition. ATC also asserts that Southern Bell did not challenge the purchase or billing amounts used by ATC in the underlying proceedings nor did it provide countervailing information. ATC speculated that the purchase/billing disparity that Southern Bell claims exists, could be due to Southern Bell's failure to include in its previous damage submissions all of the purchases by ATC under its various operating names or the operating names used by its subsidiaries named in their complaint. ATC Opposition at 11-13.

[15] *Damages Order*, 8 FCC Rcd at 1909, n.5.

[16] *Id.* We did not award damages for all of the complainant companies listed in Exhibit B as Southern Bell asserts. ATC did not file any damages calculations for the companies listed in Exhibit B.

[17] LDDS Communications, Inc. (LDDS) filed a petition for reconsideration (LDDS Petition) on behalf of its member companies. Indiana Bell Telephone Company (Indiana Bell) filed an opposition (Indiana Bell Opposition). Southern Bell Telephone Company and South Central Bell Telephone Company (BellSouth) and also challenged the Commission's award of damages to LDDS (BellSouth Petition, File Nos. E-90-230--231) and we will address those concerns in this section of the order. LDDS also requests that damages be awarded to these companies with daily compounded interest from January 1, 1989 until paid in full. We will address the issue of interest in Section III of this order.

[18] LDDS Petition at 2.

right.[19] According to LDDS, defendants assumed that the trade names provided in Exhibit B were actually companies owned by the LDDS subsidiaries that were legally capable of pursuing separate damages claims.[20] LDDS further claims that because it was required to file its reply brief simultaneously with that of the defendants, it was unaware of Indiana Bell's misinterpretation and could not address it until now.[21]

8. In its opposition, Indiana Bell contends that the LDDS Petition relies on new facts not currently in the record and, therefore, violates the Commission's reconsideration rules as provided in Section 1.106.[22] Moreover, Indiana Bell argues that petitioner makes an arbitrary distinction between subsidiaries and trade names and contends that it had no way of knowing that the trade names introduced by LDDS were in any way associated with the LDDS subsidiaries.[23] BellSouth argues that LDDS is attempting to claim damages on behalf of new companies, which it now claims were doing business under numerous "fictitious names."[24] BellSouth contends that LDDS seeks to enter new facts into the record at this late date.[25] Finally, Indiana Bell argues that LDDS' claim for Telemarketing is barred by the statute of limitations since (1) Telemarketing was not included as a trade name in the original complaint, (2) petitioner did not amend the complaint to include this entity, and (3) it is now four years after the close of the statute of limitations period.[26] In reply, LDDS reiterates its main contentions, emphasizing that its claim on behalf of Telemarketing was included in its complaint.[27]

2. Discussion

9. After careful consideration of the facts and arguments presented by the parties, we grant LDDS' petition and adjust LDDS' damages award by the amount requested. [28] We are not persuaded by Indiana Bell's claims that LDDS relies on new facts not currently in the record and that relief for Telemarketing Communications is barred by the statute of limitations. LDDS' petition constitutes a timely clarification of a *bona fide* misinterpretation of facts already in the record. Moreover, respondents' argument that petitioner's claim for Telemarketing is time-barred is incorrect. LDDS' claims for all of the subsidiaries in question were made in its original complaint and, therefore, are well within the applicable limitations period. With respect to Indiana Bell, our initial denial of damages was based on a misinterpretation which LDDS has since clarified, and we find it appropriate to adjust LDDS' damages award by the amount previously not allowed. In the case of BellSouth, we directed an adjustment of LDDS' damage award to disallow claims for improperly added companies.[29] Thus because LDDS' damage award did not include such improper claims, we find that no further adjustments to LDDS' damage awards are warranted.

C. Competitive Telecommunications Association Petition

1. Contentions of the Parties

10. In seeking reconsideration of the Commission's finding of liability and award of damages,[30] CompTel raises arguments that, with the exceptions discussed below, were previously considered at length and rejected by the Commission.

11. In its petition, CompTel first argues that the Commission applied the wrong legal standard in addressing its damages claim. According to CompTel, "black letter law" dictates that where a complainant has established that a carrier's rates are unjust and unreasonable under Section 201(b) of the Act, the measure of damages is the difference between the rate paid and the rate that would have been paid had the charges been just and reasonable.[31] CompTel contends, in effect, that the Commission is bound to apply this standard to CompTel's damages claims whether or not it incurred actual damages.[32]

12. CompTel next raises several arguments to support its claim that the Commission erred in allowing defendants to offset damages claims. As a threshold matter, CompTel contends that the Commission lacks the authority to reduce a complainant's damages based on equitable or public interest considerations.[33] CompTel argues that even if such authority exists, equitable and public interest consider-

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[19] *Id.*
[20] *Id.* at 7.
[21] *Id.*
[22] Indiana Bell Telephone Co. Opposition to LDDS Petition for Reconsideration, File No. E-90-221 (Indiana Bell Opposition) at 1.
[23] *Id.* at 2.
[24] BellSouth Petition at 12-13; BellSouth Reply to Opposition to Petition for Reconsideration, File Nos. E-90-230-231 (BellSouth Reply) at 4.
[25] BellSouth Reply at 5.
[26] Indiana Bell Opposition at 4-5.
[27] LDDS Reply to Opposition to Petition for Reconsideration, File No. E-90-221 (LDDS Reply), at 1.
[28] At page 11 of its petition concerning Indiana Bell, LDDS calculates the damages its subsidiaries incurred in accordance with the Commission's methodology set forth in the *Damages Order*. The results of these calculations are as follows:

Subsidiaries	Traffic Sensitive Damages	Offsets	Net
Com-Link 21	$ 513.	$ 27.	$ 486.
Inter-Comm Tel.	986.	52.	934.
Telemarketing Comm.	$182,088.	$65,368.	$116,720.

[29] *Damages Order*, 8 FCC Rcd at 1909, n.6.
[30] Competitive Telecommunications Association Petition for Reconsideration (CompTel Petition), File Nos. E-91-135--139, E-91-142--144, E-91-146--148, E-91-150--153, and E-91-159.
[31] CompTel Petition, File Nos. E-91-135-139, E-91-142-144, E-91-146-148, E-91-150-153, E-91-159 at 4-6 (citing *Louisville & Nashville R. Co. v. Sloss-Sheffield Steel & Iron Co.*, 269 U.S. 217, 235 (1925); *Southern Pac. Co., v. Darnell-Taenzer Lumber Co.*, 245 U.S. 531 (1918); *ASG Industries, Inc. v. United States*, 548 F.2d 147, 152 (6th Cir. 1977); Hughes Sports Network, 34 FCC 2d 691, 693 (1972)).
[32] *See* CompTel Petition at 5-6. CompTel contends that consideration of actual damages is only appropriate where a violation of the prohibition against unreasonable discrimination under Section 202(a) of the Act, 47 U.S.C. § 202(a) (1988) is found.
[33] CompTel Petition at 7-9.

ations do not support a reduction in CompTel's damages in the instant case. To find otherwise, CompTel contends, would allow the defendants to cross-subsidize their rates and would shift the risk that a carrier will violate rate of return prescriptions from the carrier to the carrier's customers.[34] CompTel further contends that offsets are improper because the Commission lacks the authority to consider a carrier's complaint or counterclaim against a customer/complainant.[35] CompTel further argues that allowing offsets violates the filed rate doctrine and permits the defendants to retroactively raise rates.[36]

13. CompTel also seeks reconsideration of the Commission's finding that complainant Communications Services, Inc. (CSI) is not entitled to an award of damages from Bell Atlantic because CSI failed to substantiate its claim to have purchased access service from Bell Atlantic during the relevant monitoring period. CompTel argues that CSI did indeed substantiate its damages claim by satisfying the test the Commission employed in this proceeding.[37] Specifically, CompTel asserts that CSI met its burden by showing that it purchased $14,140,970 of interstate access services from Bell Atlantic during the monitoring period, and by supporting this showing with an affidavit attesting that the stated amount accurately reflected the company's records.[38] CompTel further argues that the Commission's basis for not awarding CSI damages, specifically Bell Atlantic's claim to have no billing records or ACNA code for CSI, makes the *Damages Order* internally inconsistent since, elsewhere in the order, the Commission found that such claims by defendants are not sufficient to overcome the kind of showing made by CSI in this instance.[39] Moreover, CompTel contends that Bell Atlantic's statements regarding CSI are not credible since Bell Atlantic admits to having possessed additional information regarding the identity of CSI, including ACNA and other carrier identification codes, which identified CSI unambiguously but which Bell Atlantic never reviewed and, more importantly, never used to supplement the record in this proceeding and to update its statements regarding CSI.[40]

14. Finally, CompTel seeks clarification of the methodology the defendants must use to calculate interest on the complainants' damage awards. CompTel argues that since the IRS interest rate for tax refunds is compounded daily, the Commission, in choosing to use that IRS tax rate, has by implication also chosen to use compound rather than simple interest.[41]

15. In opposition,[42] the majority of the respondents contend that the legal authority cited by CompTel to support the measure of damages it advocates is inapplicable in a Section 208 proceeding alleging a rate of return violation.[43] Southwestern Bell argues that the Commission went against the procedures prescribed in Sections 201 and 204 of its rules by failing to suspend the contested rates and by not issuing an accounting order in this proceeding.[44] It further contends that because its tariffed rates are reasonable and were not suspended or investigated, the complainant's only available action is a complaint under Sections 206 and 208 of the Act, under which it may recover only upon proving consequential damages.[45] Southwestern Bell reasons that, under Sections 206 and 208, a complainant cannot allege that rates are unreasonable and, in so doing, claim the difference between what the rates were and what they should have been. According to Southwestern Bell, such an argument constitutes an unpermitted mixture of proceedings under Section 201 and 204 with those under Sections 206 and 208.[46] It further argues that because the reasonableness of tariffed rates cannot be challenged in a formal complaint proceeding, complainants have no cause of action.[47] In addition, Southwestern Bell maintains that CompTel's complaint was barred by the limitations provisions of Section 415 (e) of the Act.[48] It claims that complainant's cause of action accrued "upon the delivery of the communications in question" and, hence, "[s]ince such delivery occurred more than two years prior to the filing of this action, this complaint is barred."[49]

16. Regarding CompTel's arguments against offsets, several respondents state that the Commission has the right to consider equity and public policy in the awarding of damages, and that such considerations in this situation support the awarding of offsets.[50] Some respondents also note that CompTel has offered no evidence that the defendants targeted their rates to cross-subsidize or discriminate in violation of Section 202 of the Act.[51] Regarding CompTel's argument concerning the filed rate doctrine, BellSouth argues that the complainant confuses rates with earnings, reasoning that the Commission's findings were based exclusively on an analysis of overearnings and, therefore, did not constitute a retroactive revision of the defendants' tariffs.[52]

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[34] *Id.* at 9-11.

[35] *Id.* at 11-13 (citing Illinois Bell Tel. Co. v. AT&T, 4 FCC Rcd 5268, 5270 (1989) and Thornell Barnes Co. v. Illinois Bell Tel. Co., 1 FCC 2d 1247, 1275 (1965)).

[36] CompTel Petition at 12.

[37] *Id.* at 15. CompTel relies on the *Damages Order*, 8 FCC Rcd at 1876-1877, in asserting that to pass the Commission's test for substantiated damages claims, "a Complainant must state in its brief(s) the sum certain amount of interstate access it purchased from a Defendant during the monitoring period, and must support such data by affidavit."

[38] CompTel Petition at 15.

[39] *Id.* at 16, citing *Damages Order*, 8 FCC Rcd at 1925, para. 2.

[40] *Id.* at 16.

[41] *Id.* at 13-14.

[42] NYNEX, Pacific Bell, BellSouth, Cincinnati Bell, Southwestern Bell, Ameritech and Bell Atlantic filed Oppositions to CompTel's Petition.

[43] *See, e.g.*, Opposition of Southwestern Bell Telephone Company, File No. E-91-148 (SWBT/CompTel Opposition) at 2-3.

[44] *Id.* at 3-4.

[45] *Id.* at 6-7.

[46] *Id.*

[47] *Id.*

[48] Section 415 (e) of the Communications Act states in pertinent part that:

> the cause of action in respect to the transmission of a message shall, for the purposes of this section, be deemed to accrue upon delivery or tender of delivery thereof by the carrier, and not after.

[49] SWBT/CompTel Opposition at 8.

[50] *See, e.g.*, Ameritech Opposition to CompTel's Petition for Reconsideration, File Nos. E-91-136-139 at 3.

[51] *See, e.g.*, NYNEX Opposition to Petition for Reconsideration, File Nos. E-91-142-143 at 4.

[52] Bell South Opposition to Petition for Reconsideration, File Nos. E-91-146-147 at 5-6.

Finally, most of the respondents argue that the Commission should reject CompTel's claim for interest to be compounded daily. These respondents maintain that the Commission's decision to award simple interest was based on valid precedent and, to the extent that interest payments are necessary to effect a full and fair remedy, compounding the interest daily would give CompTel a greater effective tax rate than what has traditionally been awarded by the Commission.[53]

2. Discussion

17. With three minor exceptions, the record here consists of arguments that already have been considered at length and resolved in the *Damages Order* and in the *MCI Damages Order*.[54] We now turn to those exceptions.

18. First, CompTel argues that the Commission applied the incorrect legal standard in addressing complainants' damages claims. We find no merit in CompTel's contention that the Commission is bound by law to award damages in these proceedings based solely on the difference between the defendants' unlawful rates and rates that would have produced earnings within the prescribed levels. We pointed out in the *MCI Damages Order* that the issue presented in these proceedings is the extent to which the complainants incurred actual damage as a consequence of defendants' violations of a binding rate of return prescription.[55] The focus of CompTel's complaints is not defendants' individual rates *per se*, but the excessive earnings produced by these rates and their effect on the CompTel complainants. It is, therefore, entirely reasonable to examine the sum of a complainant's purchases of interstate access services from defendants during the period in question to determine whether the complainant suffered any measurable damages that can be attributed to defendants' excessive earnings levels.[56] CompTel has presented no new evidence or arguments on reconsideration that would persuade us to alter this ruling.

19. Second, CompTel requests reconsideration of the Commission's refusal to award damages to Communications Services, Inc. (CSI). After careful review of the record, we grant CompTel's request and award CSI damages in the amount of $195,144 excluding interest.[57] We are persuaded on the record before us that CSI substantiated its damages claim by specifying, in its briefs, the sum certain of interstate access it purchased from Bell Atlantic, and supporting such data by affidavit.

20. Third, CompTel requests clarification regarding the methodology used to compute interest on the damages awards. We deal with the interest question below.

D. Sprint Petition

1. Contentions of the Parties

21. In its petition for limited reconsideration,[58] Sprint seeks reconsideration of the Commission's reduction of its damages against the defendants.[59] According to Sprint, the Commission's mathematical calculations were based upon a misunderstanding of Sprint's methodology in calculating its damages. Sprint argues that the Commission, without providing a reasonable explanation, wrongly adjusted and effectively reduced Sprint's market share of defendants' switched traffic sensitive access services by half. In its Initial Brief, Sprint argues that it demonstrated that it is entitled to $1,306,300 in damages from NET. Sprint contends that it derived this figure by first calculating what NET's earnings would have been at the prescribed maximum rate of return, then subtracting the figure thus derived from the actual switched traffic sensitive access net earnings reported by NET on its Form 492 Report, and finally adjusting the difference to reflect federal and state income tax adjustments. Sprint maintains that it determined that NET's total liability for damages was $18,919,900 and multiplied this damage amount by 6.90%[60] to calculate its share of such total, equaling $1,306,300. Sprint asserts that the switched traffic sensitive revenue figures taken from NET's Form 492 did not include carrier common line revenues. Sprint also maintains that the data supplied by NET in response to Sprint's interrogatories were used only to calculate Sprint's market share. Further, Sprint argues that the defendants did not challenge Sprint's methodology in calculating its damage claims. In response, NYNEX argues that Sprint is not entitled to any damages, much less the damages that it claims.[61]

2. Discussion

22. After careful consideration of the facts and arguments presented by the parties, we grant Sprint's petition and

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[53] *See, e.g.*, Cincinnati Bell Telephone Co. Opposition to CompTel Petition for Reconsideration, File No. E-91-159 at 2.

[54] 8 FCC Rcd at 1517.

[55] *See id.* at 1542-43.

[56] *See id.*

[57] In reaching this figure, we reviewed the damages calculations CompTel provided in its initial brief and reply brief, verified that the correct computation methodology was used, and determined that the complainant's figure was accurate. We note that this figure does not reflect offsets for any category underearnings because Bell Atlantic failed to compute such offsets in its own damages calculations. *See, e.g.*, Response of the Bell Atlantic Telephone Companies to the First Set of Interrogatories of American Network Exchange, Inc., File No. E-91-135, at Attachment 3, page 1.

[58] Sprint filed a petition for limited reconsideration (Sprint Petition) of our damage awards from New York Telephone Company (NYT) and New England Telephone and Telegraph Company (NET) (collectively "NYNEX"). NYNEX filed a brief opposition in File Nos. E-90-122--123 (NYNEX Opposition).

[59] The Commission adjusted Sprint's damages calculations and found that Sprint would have been entitled to $681,684.00 from NET and $454,521.00 from NYT. The Commission found that the defendants' underearnings in the special access category offset Sprint's damages claims. *See Damages Order*, 8 FCC Rcd at 1919. Sprint filed its petition before the Commission in order to clarify its methodology in calculating its damages in the event that the allowance of offsets are reversed in other proceedings before various appellate courts.

[60] Sprint asserts that this is the ratio of Sprint's payments to NET for traffic sensitive and common line access services during the monitoring period to the total amount of the revenues received by NET for those access services during such period.

[61] NYNEX Opposition at 2. Sprint filed a brief reply, stating that it is not seeking reconsideration of the allowance of offsets,

adjust its damages calculations by the amount requested.[62] In responding to the complainants' requests for information pertaining to damages and offsets in the underlying proceedings, NET and NYT stated that they could not separate their switched traffic sensitive billings from their "switched access" billings, which included charges for carrier common line access services.[63] Instead, these defendants submitted to complainants information which aggregated the revenues, expenses, rate bases and operating incomes for both the switched traffic sensitive and carrier common line categories. Defendants also aggregated and averaged the respective rates of return earned in both categories. In the *Damages Order*, after reviewing the complainants' and defendants' submissions, we determined that by using the billed revenues information provided by defendants, the complainants had derived switched traffic sensitive market shares that included defendants' common line and switched traffic sensitive revenues. There were no apparent adjustments to reflect complainants' actual purchases in the switched traffic sensitive category. We found that by computing their damages in this manner, complainants had artificially inflated their market shares in the switched traffic sensitive category and had overstated their damages claims. We made adjustments to complainants' damage computations wherever appropriate based on information provided in the record.[64] We are now persuaded by Sprint's argument that the adjustments were not necessary in its case.[65] Sprint has submitted information in the record, which defendants do not refute, showing that it purchased service from NET and NYT in the switched traffic sensitive and common line categories in roughly equal proportions. We conclude, therefore, that the 6.90 per cent ratio Sprint used to compute its share of defendants' overearnings accurately reflect Sprint's actual purchases during the relevant period in contrast to ratios computed by other complainants in proceedings involving NYNEX. Accordingly, we grant Sprint's petition for limited reconsideration.

E. BellSouth Telecommunications, Inc. Petition

1. Contentions of the Parties

23. In seeking reconsideration of the Commission's finding of liability and award of certain damages,[66] BellSouth raises arguments that, with the exceptions discussed below, have been previously considered at length and rejected by the Commission. According to BellSouth, the Commission did not address BellSouth's fundamental defense that it was not subject to a valid rate of return prescription at the access service category level and therefore could not be found liable for violating Section 201(b) of the Act.[67] BellSouth argues that *AT&T v. FCC* [68] reversed and remanded the Commission's *Phase I Order*,[69] finding the effect of the *Phase I Order*, as well as the automatic refund rule, arbitrary and capricious. BellSouth contends that this ruling was reinforced by the court in *Ohio Bell*.[70] Moreover, BellSouth argues that subsequent to the *AT&T v. FCC* decision, the Commission had an opportunity to adopt new rate of return rules but instead it terminated the proceeding without readopting the rules that were set aside in *AT&T v. FCC*.[71]

24. BellSouth also argues that material factual disputes exist with respect to the amount of damages awarded to certain complainants and that the Commission should reconsider the amounts awarded.[72] According to BellSouth, the damages calculations provided by complainants in their briefs reflect billing amounts that differ from those reflected in BellSouth's own records, which it argues grossly inflate complainants' claims. BellSouth argues that the Commission accepted the complainants' claimed damages amounts and disregarded BellSouth's submissions without any factual basis on the record. According to BellSouth, the Commission has no basis to resolve the factual dispute on this paper record or to ascertain the credibility of the claims of the respective parties.[73] BellSouth maintains that its billing records were used to calculate the market share information provided to complainants in response to their interrogatories and reflects the same revenue data used to

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but is instead challenging the methodology used by the Commission in computing Sprint's damages. Sprint Reply to Opposition to Petition for Limited Reconsideration at 1-2.

[62] According to Sprint's calculations, its share of defendants' switched traffic sensitive overearnings totalled $900,300 in the case of NYT and $1,306,300 in the case of NET. We note that these damages amounts are totally offset by NYT underearnings in the common line access and special access categories and by NET underearnings in the special access category. *See Damages Order*, 8 FCC Rcd at 1919, 1921.

[63] *See Damages Order*, 8 FCC Rcd at 1922, n.1.

[64] Generally, complainants did not realize that NYNEX's responses with regard to billing amounts accounted for billings in both the carrier common line and switched traffic sensitive categories.

[65] Sprint Petition at 2.

[66] BellSouth Telecommunications, Inc. (BellSouth) filed a petition for reconsideration (BellSouth Petition) in the following proceedings: Americall Systems of Lousiville (Americall), File Nos. E-91-007--008; American Network Exchange, Inc. (AmNex), File Nos. E-91-146--147; ATC, File Nos. E-91-74, Charter Network Company, File Nos. E-90-279--280; First Phone of New England, Inc. (First Phone), File Nos. E-90-313; LDDS, File Nos. E-90-230--231; Litel Communications, Inc. (Litel), File Nos. E-90-334--335; and South Tel, Inc. (South Tel), File No. E-90-390. The Competitive Telecommunications Association (CompTel) file an opposition (CompTel Opposition) on behalf of Americall, ATC, Charter, First Phone, LDDS, Litel and South Tel to the BellSouth Petition. CompTel also filed an opposition on behalf of AmNex (AmNex Opposition).

[67] BellSouth Petition at 2-3.

[68] *American Telephone and Telegraph Co. v. FCC*, 836 F.2d 1386, 1390 (D.C. Cir. 1988) (*AT&T v. FCC*).

[69] BellSouth Petition at 3 (citing Authorized Rates of Return for the Interstate Services of AT&T Communications and Exchange Carriers, FCC 85-527 (released Sept. 30, 1985), 50 Fed. Reg. 41,350 (Oct. 10, 1985), (*Phase I Order*), *on reconsideration*, Memorandum Opinion and Order, FCC 86-114 (released March 24, 1986), 51 Fed. Reg. 11,033 (Apr. 1, 1986) (*Phase I Reconsideration*).

[70] BellSouth Petition at 7, citing *Ohio Bell Telephone Company v. FCC*, 949 F.2d 864, 871 (6th Cir. 1991) (*Ohio Bell*).

[71] BellSouth Petition at 9, citing Represcribing the Authorized Rate of Return for Interstate Services of Local Exchange Carriers, 5 FCC Rcd 7507, 7532 (1990).

[72] BellSouth disputes the damages calculations contained in the *Damages Order* for the following complainants: Americall; AmNex; ATC; Charter; LDDS; Litel; and South Tel. We address BellSouth's challenges to the amounts awarded to ATC and LDDS in Sections II.A. and II.B., respectively, of this order.

[73] BellSouth Petition at 11.

file the FCC Form 492. BellSouth argues that such a disparity in the record renders it impossible for BellSouth or for the Commission to compute the proper amount of damages attributable to each complainant.[74]

25. Finally, BellSouth argues that although the Commission found that defendants would be entitled to offsets against category specific damages, the damages awarded to complainants did not include such offsets.[75] BellSouth contends that the records in these proceedings contained the necessary data to establish the offsets to which BellSouth is entitled. In certain cases, BellSouth states that the Commission recalculated damages using incorrect maximum or minimum returns, and argues that the Commission should reconsider its use of 12.40% to calculate overearnings and 12.00% to calculate offsets.[76] BellSouth contends that if the Commission is going to award damages based on the present record, it must use BellSouth's billing data in calculating damages.[77] In light of these disputes of material fact, BellSouth requests that the Commission defer its requirement that the damages awarded be paid within 60 days of the release date of the *Damages Order*.

26. In opposition, complainants argue that the BellSouth Petition should be denied because the Commission has already addressed and rejected BellSouth's contentions.[78] Complainants argue that the holding in *AT&T v. FCC* only addressed the validity of the refund rule and not the entirety of the proceedings in Phase I of CC Docket No. 84-800, and is therefore not relevant to the instant proceedings.[79] Americall further argues that *AT&T v. FCC* did not find fault in the establishment of access categories subject to rate of return prescriptions, except in the context of the refund rule where there was the possibility that a carrier who had to refund overearnings in one category and absorb underearnings in another category might not earn its overall authorized return within the monitoring period.[80] In addition, CompTel argues that *Ohio Bell* does not govern these proceedings because the issue here is reparations pursuant to Section 208 and not refunds pursuant Section to 204.[81] According to Americall, these complaint proceedings address actual damages suffered by specific complainants, unlike the automatic refund rule, which required refunds of all overearnings.[82]

27. In response to BellSouth's argument that the Commission should reconsider its decision to award damages, as well as certain amounts awarded, CompTel argues that BellSouth has provided no basis for reconsideration. According to CompTel, where a complainant has established that a carrier's rates were unjust and unreasonable under Section 201(b) of the Act,[83] the measure of damages is the difference between the rate paid and the rate that would have been paid had the charges been just and reasonable.[84] According to CompTel, Section 201 of the Act does not require that a complainant show that it has been actually damaged as a result of a defendant's excessive rates.[85] CompTel further argues that there is no legal or factual basis for recomputing the damages awarded by the Commission. CompTel posits that the Commission has authority to resolve the factual disputes in the instant "paper record" pursuant to Section 208 of the Act, which specifically confers on the Commission authority to conduct complaint proceedings "in any manner and by such means as it shall deem proper."[86] Complainants argue that they submitted sufficient evidence to substantiate claims in their briefs and that the Commission surveyed all of the evidence before it and used that which was available.[87] Americall points out that at no time during the previous proceedings did BellSouth challenge the purchase or billing amounts employed by Americall in its damage calculations.[88]

28. Complainants argue that BellSouth is precluded from seeking offsets on reconsideration because of its own failure to provide evidence of offsets in the underlying proceedings.[89] Americall contends that the data BellSouth did supply was found to be undecipherable.[90] According to complainants, BellSouth did not provide timely, coherent evidentiary presentations and the Commission should now reject BellSouth's attempt to rectify this error by placing new offset calculations into the record. Complainants state that new evidence provides ground for reconsideration only where (1) it arises from changed circumstances; (2) it was previously unknown to a petitioner and could not have been ascertained through the exercise of ordinary diligence; or (3) its consideration is in the public interest.[91] Complainants assert that none of these criteria is met. According to complainants, even BellSouth admits that the new evidence is based on the same source data as its previous submission and that these new "facts" could have been

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[74] BellSouth asserts that in a comparable situation involving Ameritech, where a factual dispute was present, the Commission ruled that, in light of the existence of a factual dispute, the record did not support a calculation of damages with a reasonable degree of certainty. BellSouth Petition at 12, citing *Damages Order*, 8 FCC Rcd at 1900, n.8.

[75] BellSouth Petition at 14.

[76] *Id.*

[77] Using the Commission's methodology, BellSouth provides damages calculations which it contends were available to the complainants and the Commission. BellSouth Petition at 11.

[78] *See, e.g.*, CompTel Opposition at 3.

[79] *Id.* at 3; Americall Opposition at 3.

[80] Americall Opposition at 5, n.3 (citing *Ohio Bell* where the court observed that Part 69 rules require that carriers earn no more than the category authorized rate of return).

[81] *Id.* at 6.

[82] *Id.*

[83] 47 U.S.C. Section 201(b) (1988).

[84] CompTel Opposition at 6-7 (citing *Louisville & Nashville R. Co. v. Sloss-Sheffield Steel & Iron Co.*, 269 U.S. 217, 235 (1925); *Southern Pac. Co., v. Darnell-Taenzer Lumber Co.*, 245 U.S. 531 (1918); Hughes Sports Network, 34 FCC 2d 691, 693 (1972)).

[85] *Id.* at 7 (citing *ASG Industries, Inc. v. United States*, 548 F.2d 147, 152 (6th Cir. 1977).

[86] CompTel Opposition at 8 (citing 47 U.S.C. § 208 (1988)).

[87] CompTel Opposition at 9. CompTel states that, if a complainant supplied sufficient evidence along with damages calculations, as it did, even if a defendant directly disputed a complainant's evidence, the Commission found that complainants established by a preponderance of the evidence the amount of their access purchases. *Id.* at 9 (citing *Damages Order*, 8 FCC Rcd at 1900, n.4.).

[88] Americall Opposition at 8, stating that complainants used the information derived from BellSouth's response to interrogatories, requiring substantial interpretation and calculation.

[89] *See, e.g., id.*

[90] *Id.* at 10.

[91] CompTel Opposition at 11; Americall Opposition at 16-17.

previously presented to the Commission.[92] Moreover, complainants assert that the Commission has consistently held that the public interest is not served by reopening the record where, as here, a petitioner is merely attempting to correct its own failures.[93] Complainants argue that by failing to present offset evidence at the liability and damages briefing stage of these proceedings, BellSouth has waived any claim that offsets should be applied.[94]

29. Finally, complainants argue that BellSouth's request to stay the *Damages Order* should be denied. Americall argues that BellSouth has had the use of monies for four years which are rightfully due to the complainants and has failed to demonstrate good grounds for any further delay. Americall contends that, through its own actions in not proving offsets, BellSouth has caused greater expense to complainants in their efforts to pursue damages resulting from BellSouth's unjust and unreasonable rates. According to Americall, to compound this additional expense with a delayed payment disserves the public interest by creating disincentives for pursuit of legal rights under the Act.[95] CompTel argues that BellSouth has not satisfied any of the criteria necessary to qualify for a stay of the Commission's order on reconsideration, and thus has provided no basis for granting a stay.[96]

30. BellSouth filed a brief reply, restating its major contentions. BellSouth denies the complainants' claim that BellSouth did not provide any damages or offset calculations in the underlying proceeding. According to BellSouth, the data used by BellSouth in its petition are on record in BellSouth's responses to complainants' interrogatories.[97] BellSouth argues that it is the complainants who have failed to provide any billing or market share data needed to calculate their net damages. BellSouth also argues that it provided all of the evidence necessary to perform calculations of offsets in its responses to complainants' interrogatories.[98] According to BellSouth it could not have calculated damages because the necessary data to compute offsets were in the complainants' possession.[99] Further, BellSouth contends that it is not seeking a stay of the Commission's *Damages Order* but seeks reconsideration of the requirement that damages be paid within 60 days of the release date of the *Damages Order*. BellSouth maintains that the Commission has authority under Section 209 of the Act to require a carrier to pay money damages on a specified day and should exercise that authority here to allow for corrections to be made to the amount of damages awarded.

2. Discussion

31. After a full review, we are not persuaded to disturb the result or the underlying rationale of the *Damages Order*. Reconsideration is generally not available for purposes of rearguing matters on which there has been deliberation and decision.[100] BellSouth's contention that the Commission did not address its fundamental defense is incorrect.[101] Thus, with two exceptions, the record here consists of arguments that have already been considered at length and resolved in the *Damages Order* and in the *MCI Damages Order*[102] and we reaffirm those decisions. We turn now to those exceptions.

32. First, BellSouth contends the Commission's award of damages to certain complainants was improper because the Commission failed to resolve material factual disputes concerning the amount of access services actually purchased by the complainants during the relevant period. BellSouth argues that because of these unresolved factual disputes, the Commission had no basis upon which to award damages to these complainants. We find no merit in BellSouth's contention. In these and other rate of return complaint proceedings, we established discovery guidelines and afforded the parties ample opportunity to develop and submit evidence and arguments supporting their damages and offset claims. In the instant proceedings, the complainants, consistent with these guidelines, submitted detailed explanations of their damages computations along with the data underlying their computations. BellSouth, on the other hand, submitted only summary information purporting to show the amount of its overearnings in individual access categories during the relevant period and the complainants' market share in each of those categories. BellSouth did not present specific information regarding amounts billed to or paid by the complainants for these services,[103] nor did it challenge the billing and purchase data submitted by the complainants. In the absence of evidence and arguments to counter the complainants' evidentiary submissions, we accepted complainants' calculations and we awarded damages accordingly.[104] BellSouth's belated attempt to now supple-

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[92] CompTel Opposition at 11.

[93] *Id.* at 11 (citing In Re Nick J. Chaconas, 35 FCC 2d 698, 700 (1972)).

[94] Americall Opposition at 16.

[95] *Id.* at 18, n.11.

[96] CompTel Opposition at 14 (citing *Virginia Petroleum Jobbers Ass'n v. FPC*, 295 F.2d 921, 925 (D.C. Cir. 1958), where the court stated that a party must show that: (1) it is likely to prevail on the merits on appeal; (2) irreparable injury would result absent a stay; (3) a stay will not harm other parties; and (4) a stay will serve the public interest).

[97] BellSouth Reply to Americall Opposition to Petition for Reconsideration at 6-7.

[98] *Id.* at 6.

[99] BellSouth argues that the only factual dispute is the Commission's award of gross, rather than net, damages. BellSouth Reply at 2. This is a new argument which BellSouth did not raise in its petition. Pursuant to Section 1.106 (h), BellSouth's reply is limited to issues raised in the opposition. 47 C.F.R. § 1.106(h) (1992).

[100] MCI Telecommunications Corporation v. Pacific Bell Telephone Company, 5 FCC Rcd 3463, 3463-64 (1990) (citing Empire State Cable TV Co., Inc., 10 FCC 2d 341, 342 (1967) and Petitions for Reconsideration of Commission Action, 77 FCC 2d 54 (1980)).

[101] *See Damages Order*, 8 FCC Rcd at 1879-80.

[102] *MCI Damages Order*, 8 FCC Rcd at 1517.

[103] In response to complainants' interrogatories requesting information concerning provision of, and billing for, access services during the relevant monitoring period, BellSouth responded that such information was not applicable. *See, e.g.*, BellSouth Responses to Interrogatories, Interrogatory No. 2, File Nos. E-90-279 and E-90-280.

[104] *See Damages Order*, 8 FCC Rcd at 1909, n.2. Moreover, BellSouth incorrectly argues that the Commission declined to award damages in a case involving Ameritech based on the same type of factual dispute. *See* n.38, *supra*. In that case, we concluded that neither LDDS nor Ameritech had provided sufficient information to enable the Commission to determine the level of LDDS' damages with any degree of certainty. *See Damages Order*, 8 FCC Rcd at 1900, n.8. In the instant case, we find that the complainants have provided reliable information, which BellSouth failed to refute despite ample opportunity to do so.

ment the record with new information which it argues more accurately reflects the complainants' purchases of interstate access services must be rejected as untimely.[105]

33. Second, BellSouth contends that the Commission erroneously failed to consider offsets it presented with respect to complainants' damages claims. We have carefully reviewed the record in these proceedings and find no support for BellSouth's claims. In response to complainants' interrogatories, BellSouth provided certain information pertaining to complainants' market share in individual access service categories but did not submit specific information regarding offsets. Nor did BellSouth present specific offset claims in the briefing phase of the proceedings. As we emphasized in the *Damages Order,* it is not the role of the Commission to make a party's case for it in a Section 208 proceeding. The burden is on the complainants to prove whether and, if so, in what amounts they are entitled to damages from the defendants. Similarly, the burden is on the defendants to plead and show that no damages should be awarded or, as in the instant case, that offsets to complainants' damages claims are appropriate. Once again, BellSouth's belated attempt to introduce new information in the record must be rejected as untimely. The parties were afforded ample opportunities to develop their damages and offset claims in the underlying proceedings.

F. Westinghouse Communications Petition

1. Contentions of the Parties

34. In its petition for reconsideration, Westinghouse disputes the Commission's finding in the *Damages Order* that although Pacific Bell was liable to Westinghouse for exceeding the Commission's rate of return prescription for the 1987-1988 monitoring period, Westinghouse had failed to provide the Commission with persuasive evidence to support an award of damages.[106] Westinghouse argues that the Commission's finding was based upon Pacific Bell's assertion, in its reply brief, that it did not bill Westinghouse for access services rendered during the monitoring period and that one of the invoices submitted by Westinghouse pertained to message toll service rather than access service.[107] Westinghouse concedes that it did submit invoices for toll message services, but stresses that the bulk of the invoiced amounts related to access services.[108] Westinghouse maintains that it was the Commission's responsibility as the trier of fact to "separate the wheat from the chaff" in order to determine damages due Westinghouse.[109] It further argues that, because Pacific Bell's assertions were contained in a reply brief, Westinghouse did not have an opportunity until now to "correct the misimpressions created by Pacific Bell."[110] Finally, Westinghouse argues that the Commission improperly allowed Bell Atlantic to offset damages. It incorporates the arguments raised by CompTel in its petition for reconsideration (File Nos. E-89-382 and E-89-390) and argues (1) that the measure of damages should be the difference between what Westinghouse paid and what it would have paid had Bell Atlantic's rate been reasonable, (2) that allowances of offsets encourages impermissible cross-subsidization, and (3) that the Commission has no jurisdiction to consider Bell Atlantic's counterclaims against Westinghouse.[111]

35. In its opposition, Pacific Bell argues that Westinghouse's petition violates Section 1.106(c) of the Commission's rules by attempting to introduce facts not previously presented.[112] It argues that the Commission was correct to hold in the *Damages Order* that Westinghouse "did not file a supplementary pleading disputing Pacific Bell's contentions although given ample opportunity to develop a comprehensive record upon which damages could be determined with a reasonable degree of certainty."[113] Pacific Bell emphasizes that the petition should be dismissed because Westinghouse had been on notice since June 25, 1992 regarding the showing it was required to make in order to recover damages.[114] Moreover, Pacific Bell argues that Westinghouse's submission of billing information with its petition is useless considering that Westinghouse does not explain how it used the information to arrive at $6,788 as the proper measure of damages. In its opposition, Bell Atlantic argues that Westinghouse's petition simply argues against the logic of the Commission's order and, in so doing, presents no new facts or arguments to justify reconsideration.[115]

36. In its reply to Pacific Bell's and Bell Atlantic's oppositions, Westinghouse repeats most of the arguments it made in its petition with three exceptions. First, Westinghouse calls Pacific Bell's opposition disingenuous and charges that Pacific Bell has stonewalled it and left misimpressions in the record by not making any effort to internally assess Westinghouse's claim for damages.[116] Second, Westinghouse disagrees with Pacific Bell's claim that the information Westinghouse provided with its petition is new information. Westinghouse insists that its petition, instead of providing new information, clarified information already submitted to Pacific Bell and supported its damages calculation.[117] Third, Westinghouse argues that Bell Atlan-

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[105] Unlike petitioners ATC, LDDS, Sprint, and to an extent, CompTel, BellSouth does not seek to clarify ambiguities in the underlying proceeding, but is now trying to submit information which could and should have been developed and submitted in the underlying proceeding.

[106] Westinghouse Communications Petition for Reconsideration, File Nos. E-91-125 and E-91-129 (Westinghouse Petition) at 2, quoting *Damages Order,* 8 FCC Rcd at 1925, n.6.

[107] Westinghouse Petition at 2, citing Pacific Bell's reply brief at 12.

[108] Westinghouse Petition at 3.

[109] *Id.*

[110] *Id.* at 2, n.3. Westinghouse submitted invoices with its petition which were previously submitted in summary form demonstrating that Westinghouse purchased access services from Pacific Bell during the monitoring period. At pages 3-4 of its petition, Westinghouse refers to these invoices as support for its request for damages from Pacific Bell in the amount of $6,788.

[111] *Id.* at 5-6.

[112] Pacific Bell Opposition to Petition for Reconsideration, File No. E-91-129 (Westinghouse/Pacific Bell Opposition) at 3-4.

[113] *Id.* at 2, citing *Damages Order,* 8 FCC Rcd at 1925, n.6.

[114] Westinghouse/Pacific Bell Opposition at 2, citing Westinghouse Communications v. Bell Atlantic, et al., 7 FCC Rcd 3999 (Com. Car. Bur. 1992).

[115] Bell Atlantic's Opposition to Petition for Reconsideration, File No. E-91-125 at 1-2.

[116] Westinghouse Reply to Oppositions to Petitions for Reconsideration, File Nos. E-91-125 and E-91-129 at 2-3.

[117] *Id.* at 3.

tic's failure to respond directly to the arguments made against it merits dismissal of its opposition and an award of $5,100 in damages to Westinghouse.[118]

2. Discussion

37. We are not persuaded to disturb our findings in the *Damages Order* as they relate to the issues presented in the Westinghouse Petition. We agree that Westinghouse has been on notice since June 25, 1992, regarding the evidentiary requirements for the recovery of damages. None of the invoices that Westinghouse claims it provided to Pacific Bell, nor any other information upon which damages could be determined with a reasonable degree of certainty, was submitted into the record. Westinghouse should have submitted this billing information, including an explanation of its methodology in calculating its damages, during the fact-finding stage of the proceeding, and not with its petition for reconsideration.

38. Because the factual information provided in the invoices is new to the Commission, it can be accepted into the record only if it satisfies one of the following conditions specified in Section 1.106(c) of the Commission's Rules: (1) the new facts "relate to events which have occurred or circumstances which have changed since the last opportunity to present such matters;" (2) the new facts were "unknown to [the complainant] until after his last opportunity to present such matters which could not, through the exercise of ordinary diligence, have been learned prior to such opportunity;" or (3) the Commission determines that consideration of the facts relied on is "required in the public interest."[119] The information provided in the Westinghouse petition meets none of these requirements.

39. Contrary to Westinghouse's misconception, it is not the Commission's responsibility, as trier of fact, to "separate the wheat from the chaff." The burden is on the complainant to prove damages. As we stated in the *Damages Order*, it is not the Commission's responsibility to make a party's case. To the contrary, it was Westinghouse's obligation to fully develop the record and to prove that it was entitled to an award of damages. Finally, Westinghouse's arguments for reconsideration of our decision to offset damages for overearnings in one access category with underearnings from other categories are arguments that were resolved in the *Damages Order* after much deliberation. Rearguing these issues here is outside the scope of reconsideration.

III. PETITIONS FOR CLARIFICATION

A. Contentions of the Parties

40. In seeking clarification, petitioners request that the Commission specify whether the interest awarded on damages should be computed as simple or compound interest.[120] The petitioners argue that since the IRS interest rate for tax refunds is compounded daily, the Commission, in choosing to use the IRS rate, has by implication also chosen to use compound rather than simple interest.[121] Petitioners also contend that compounding interest daily more closely comports with economic reality and with the Commission's desire to make the injured party whole and to prevent the defendants from being unjustly enriched.[122] The petitioners acknowledge that the Commission historically has awarded only simple interest in refund cases under Section 204 of the Act.[123] The petitioners argue, however, that the Commission has not specifically addressed the methodology of daily compounding interest. Petitioners point out that when the Commission initially adopted the IRS refund rate for its interest awards, the IRS rates were calculated on a simple basis.[124] Petitioners contend that because the Commission has historically taken official notice of changes in the applicable IRS rates and incorporated them into its orders, the Commission should continue this approach in this proceeding.[125]

41. In opposition, all the respondents argue that the Commission awarded simple interest in *Teleprompter*, and since that decision provided support for the rationale behind an award of interest in this proceeding, only simple interest should be awarded here.[126] In addition, the parties claim that the Commission has historically only awarded simple interest and that petitioners have provided no compelling evidence for the Commission to depart from that

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[118] *Id.* at 4-5.

[119] 47 C.F.R. § 1.106(c).

[120] ATC Long Distance filed a petition for clarification and, alternatively, a petition for reconsideration in File No. E-91-074. LDDS Communications Inc. (LDDS) filed a similar petition in File Nos. E-90-214--220, E-90-224--225, E-90-229, E-90-233, E-90-238, and E-90-246--247. Pacific Bell Telephone Company in E-90-229 and the NYNEX Telephone Companies in E-90-224--225 filed oppositions to LDDS' petition. LDDS filed replies to these oppositions. Litel Telecommunications Corp. (Litel) filed a petition for clarification and, alternatively, a petition for reconsideration in File Nos. E-91-066 and E-91-071--083. Pacific Bell Telephone Company in E-91-066, the NYNEX Telephone Companies in E-91-082--083 and the Ameritech Companies in File Nos. E-91-071--073 filed oppositions to Litel's petition. Litel filed replies to these oppositions. Charter Network Company, L.P., (Charter Network) filed a petition for clarification and, alternatively, a petition for reconsideration in File Nos. E-90-274--275 and E-90-279--280. The NYNEX Telephone Companies opposed this petition in File Nos. E-90-274--275 and Charter Network filed replies to these oppositions. Americall Systems of Louisville (Americall) filed a petition for clarification and, alternatively, a petition for reconsideration in File Nos. E-91-006--008, E-91-010, and E-91-012--013. New York Telephone Company in File No. E-91-012 and the Ameritech Companies in E-91-010 and E-91-013 filed oppositions to the petition. Americall replied to both oppositions. South Tel, Inc., in File No. E-90-390 and LDDS Communications, Inc., in File Nos. E-90-230--231 filed unopposed petitions for clarification and, alternatively, petitions for reconsideration. Finally, First Phone of New England, Inc. (First Phone) in File Nos. E-90-390, E-90-311--312 and E-90-313 filed a petition for clarification and, alternatively a petition for reconsideration. The NYNEX Companies filed an opposition this petition and First Phone replied.

[121] *See, e.g.*, Charter Network Company, L.P. Petition for Clarification and, Alternatively, Petition for Reconsideration, File Nos. E-90-274-275, 279-280 (Charter Petition) at 6.

[122] Charter Petition at 3.

[123] 47 U.S.C. § 204 (1988).

[124] *See, e.g.*, ATC Long Distance Petition for Clarification and, Alternatively, Petition for Reconsideration, File Nos. E-91-066, 071-073, 075-082 (ATC Petition for Clarification) at 4, quoting Teleprompter of Fairmont v. C&P of West Virginia, 79 FCC 2d 232 (1980) (*Teleprompter*).

[125] *See, e.g.*, Charter Petition at 4.

[126] *See, e.g.*, Ameritech Opposition to ATC Petition for Clarification, File Nos. E-91-071-073 (Ameritech Opposition), at 1.

precedent.[127] Ameritech argues further, without explanation, that daily compounding interest would result in CompTel receiving a greater effective tax rate than awarded by the Commission.[128] In their replies, ATC, Americall, Charter Network, First Phone and LDDS restate their arguments that the daily compounding of interest effectuates the goal of providing full recompense for petitioners' loss of monies stemming from respondents' unreasonable rates.[129]

B. Discussion

42. The parties did not previously raise and we did not specifically address questions concerning the correct methodology to be used in computing interest on damages awards in common carrier complaint cases. The respondents correctly point out that the Commission has historically awarded simple interest in pole attachment proceedings under Section 224 of the Act and rate proceedings under Sections 204 and 205 of the Act. Respondents further point out that the Commission continued its practice of awarding simple interest in such cases notwithstanding the change in IRS policy in 1982. We note, however, that since the change in IRS methodology, the question of how interest should be computed in either refund or reparation cases has not been placed squarely before the Commission. After careful consideration, we conclude that adopting a general requirement that interest awarded in refund and reparations cases decided under the Act be computed on a daily compounded basis is appropriate. We are persuaded that daily compounded interest more closely reflects economic reality and more adequately compensates aggrieved parties for the value of money owed. Daily compounded interest will, therefore, better achieve the Act's goal of compensating parties who were deprived of the use of excessive charges paid and preventing the unjust enrichment of carriers who utilized funds to which they had no rightful claim. Daily compounded interest will also help to eliminate incentives carriers might otherwise have to delay resolution of cases against them.[130] Therefore, we reverse our previous practice of awarding simple interest as set out in *Teleprompter* and other prior decisions and adopted the general policy that interest awarded in proceedings under Sections 204, 205, 224 and 208 of the Act be awarded on a daily compounded basis.[131]

IV. ORDERING CLAUSES

43. Accordingly, IT IS ORDERED, pursuant to Sections 4(i), 4(j), 201, 206-209, and 405 of the Communications Act of 1934, as amended, 47 U.S.C. §§ 154(i), 154(j), 201, 206-209, and 405, that the Petitions for Reconsideration filed on April 14, 1993, by Westinghouse Communications, Inc. and BellSouth Telecommunications Inc. ARE DENIED.

44. IT IS FURTHER ORDERED that the Petition for Reconsideration filed on April 1, 1993 by ATC Long Distance in File No. E-91-074; the Petition for Limited Reconsideration filed on April 14, 1993 by U S Sprint Communications Company L.P. in File Nos. E-90-122--123; the Petition for Reconsideration filed on April 14, 1993 by LDDS Communications, Inc., and the Petition for Reconsideration filed on March 24, 1993 by the Competitive Telecommunications Association in File Nos. E-91-135--139, E-91-142--148, E-91-150--153, and E-91-159 ARE GRANTED to the extent indicated above and otherwise ARE DENIED.

45. IT IS FURTHER ORDERED that the Petitions for Clarification filed on April 1, 1993, April 12, 1993, and April 14, 1993 by ATC Long Distance, Litel Telecommunications Corp., Charter Network Company, L.P., Americall Systems of Louisville and First Phone of New England, Inc., ARE GRANTED to the extent indicated here and otherwise ARE DENIED.

46. IT IS FURTHER ORDERED that Southern Bell Telephone Company SHALL PAY to ATC Long Distance additional damages in the amount of $298,728 (Two hundred ninety-eight thousand seven hundred and twenty-eight dollars); that Indiana Bell Telephone Company SHALL PAY to LDDS Communications, Inc. additional damages in the amount of $118,140 (One hundred eighteen thousand one hundred and forty dollars); and that the Bell Atlantic Companies SHALL PAY to the Competitive Telecommunications Association damages in the amount of $195,144 (One hundred ninety-five thousand one hundred forty-four dollars) within 60 days after the release date of this Memorandum Opinion and Order.

47. IT IS FURTHER ORDERED that Southern Bell Telephone Company, the Bell Atlantic Companies, and Indiana Bell Telephone Company SHALL PAY to complainants interest on the damages specified here computed at the IRS rates set forth in Appendix D of the *Damages Order* from January 1, 1989 until the date full payment is made.

FEDERAL COMMUNICATIONS COMMISSION

William F. Caton
Acting Secretary

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[127] *See, e.g.*, NYNEX Opposition to ATC Petition for Clarification, File Nos. E-91-082-083, at 2.

[128] Ameritech Opposition at 9.

[129] *See, e.g.*, ATC Reply to NYNEX Opposition, File Nos. E-91-082-083 (ATC Reply) at 2, LDDS Reply to NYNEX Opposition to Petition for Clarification, File Nos. E-90-224-225 at 2-5.

[130] We note that in adopting a daily compounded interest methodology for IRS use, Congress reasoned that simple interest failed to adequately compensate for the value of money owed and provided taxpayers incentives to delay resolution of tax controversies. *See* 1982 U.S. Code Cong. and Admin. News, p. 1047; Tax Equity & Fiscal Responsibility Act, P.L. 97-248, p. 305 (1982). We find this rationale to be equally applicable to refund and reparation cases decided under the Communications Act.

[131] In adopting this general policy, we do not foreclose the possibility that the unique circumstances of a particular case may warrant the application of simple rather than daily compounded interest.

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 93-54

In Re Applications of

GAF BROADCASTING COMPANY, INC. File No. BRH-910201WL

For Renewal of License of Station
WNCN(FM) (104.3 MHz),
New York, New York

CLASS ENTERTAINMENT AND COMMUNICATIONS, L.P. File No. BPH-910430ME

THE FIDELIO GROUP, INC. File No. BPH-910502MQ

For a Construction Permit for a New
FM Station on 104.3 MHz at
New York, New York

MEMORANDUM OPINION AND ORDER

Adopted: August 5, 1993; Released: August 16, 1993

By the Commission:

1. On March 15, 1993, the Mass Media Bureau's Audio Services Division (the Division) released a Hearing Designation Order (HDO) in the above captioned proceeding. Now before the Commission are a Motion for Deferral of Procedural Dates filed April 12, 1993, by The Fidelio Group, Inc. (Fidelio) and a Petition for Reconsideration filed April 14, 1993 by Listeners' Guild, Inc. (Guild).[1] In addition, GAF and Class Entertainment and Communications, L.P. (Class) filed a Joint Request for Dismissal of Court Appeal (Joint Request), a Joint Motion for Approval of Agreement for Dismissal of Applicant (Joint Motion), and a Joint Motion to Stay Proceeding Pending Action on Settlement Agreement (Stay Request) on June 15, 1993, June 23, 1993 and June 23, 1993, respectively.[2]

2. For the reasons discussed below, we will dismiss Fidelio's motion, deny Guild's petition, grant GAF and Class's Joint Request, deny their Joint Motion and dismiss their Stay Request. Consistent with these actions, we will also address a matter of concern raised by the Bureau's referral of all pleadings, allegations, and agreements which relate to WNCN(FM)'s equal employment opportunity program and practices to the Bureau's EEO Branch for disposition.

I. MOTION FOR DEFERRAL OF PROCEDURAL DATES

3. Fidelio requests a deferral of all procedural dates pertaining to the hearing because there are matters pending before the Court of Appeals and the EEO Branch that "could likely have a serious impact on the resolution of the comparative case."[3] GAF argues, however, that Fidelio's motion is now moot and should be dismissed because the ALJ dismissed Fidelio's application for failure to prosecute, *GAF Broadcasting Company, Inc.*, FCC 93M-295, released May 21, 1993, and there has been no appeal of that order. Because Fidelio is no longer a party to this proceeding, we will dismiss its motion as moot.

II. PETITION FOR RECONSIDERATION

4. Guild argues that the HDO erred by (1) excluding the EEO issue from the hearing, (2) by mischaracterizing some of Guild's arguments and failing to consider others and (3) by not naming Guild as a party to the hearing proceeding.[4] We disagree. Guild contends that the Division's action referring the EEO allegations to the EEO Branch and conditioning any grant of GAF's renewal application on the resolution of the EEO allegations is "a prejudgment of the central question of whether those allegations would

[1] The following additional pleadings were filed: (a) a Motion to Dismiss filed April 16, 1993, by the Mass Media Bureau (MMB); (b) an Opposition filed April 20, 1993, by GAF Broadcasting Company, Inc. (GAF); (c) an Opposition filed April 28, 1993, by MMB; (d) an Opposition filed April 29, 1993, by GAF; (e) Comments filed May 6, 1993, by Guild; (f) a Consolidated Opposition filed May 17, 1993, by Guild; and (g) a Request for Dismissal of Motion for Deferral filed June 21, 1993 by GAF.

[2] As to the Joint Request, Joint Motion and Stay Request, the Mass Media Bureau (Bureau) filed consolidated comments on July 6, 1993, and GAF and Class filed a joint reply on July 15, 1993. In addition, GAF filed a request for expedited action on August 2, 1993.

[3] In the case before the Court of Appeals, appellants argue that the Commission, in reviewing GAF's transfer of control application seeking approval of a corporate reorganization, erred by refusing to address questions concerning GAF's qualifications to be a licensee because of alleged securities law violations and related wrongdoings by its former parent corporation and a former officer and director. *Shareholders of GAF Corporation*, 7 FCC Rcd 3225 (1992), appeal pending *sub nom. Class Entertainment and Communications, L.P. v. FCC*, No. 92-1269, U.S. Court of Appeals, D.C. Circuit. The HDO in this proceeding referred all allegations of EEO violations to the EEO Branch for disposition. *GAF Broadcasting Company, Inc.*, 8 FCC Rcd 1742, NOTE to n.1 (1993).

[4] Guild's petition requests that all of the issues alleged in its petition to deny GAF's renewal application be designated for hearing. To the extent that that request refers to matters not specifically raised and argued in the instant petition, no showing warranting such relief has been made and Guild's request is thus entitled to no further consideration. See 47 C.F.R. § 1.106(d).

warrant denial of the renewal application," and thus denies Guild its statutory right to a hearing on its EEO-related allegations under 47 U.S.C. § 309(e).[5]

5. We disagree with Guild's interpretation of the Division's action. The Mass Media Bureau regularly submits allegations of EEO misconduct to its EEO Branch to determine whether there have been any violations of the Commission's Rules. The Division separated the EEO matters from the hearing to allow the hearing to proceed expeditiously. To this point, the EEO Branch has not acted on the matters before it and, thus, there has been no determination regarding the allegations. Pursuant to the clear intent of the HDO, as soon as the EEO Branch concludes its analysis of WNCN(FM)'S EEO program and practices, we are directing the Bureau, a party herein, to file a pleading with the ALJ reporting the EEO Branch's findings and recommendations. At that time the parties and Guild may file pleadings in response to that submission. Thereafter, the ALJ should determine what consideration, if any, is to be given to the EEO allegations in this proceeding. If a basic qualifying issue is specified against GAF based on Guild's allegations, Guild would, of course, be entitled to status as a party in this proceeding. See also paragraphs 19 to 21 herein. Finally, if it is determined that no substantial and material question of fact has been raised concerning GAF's EEO program and practices, Guild would still have any appeal rights to which it would be entitled by virtue of its filing a petition to deny GAF's renewal application. See *GAF Broadcasting Company, Inc.*, 8 FCC Rcd at 1747 ¶ 46. Thus, the Division's action of referring the EEO allegations to the EEO Branch for consideration was not improper and has not deprived Guild of any rights, including those it might claim under 47 U.S.C. § 309(e).

6. Guild's argument that the HDO mischaracterized and failed to address crucial allegations of licensee misconduct that reflect adversely on GAF's fitness to be a licensee is also without merit. Guild argues that GAF has consistently used improper threats and inducements in an effort to dissuade Guild from presenting facts and arguments adverse to GAF to the Commission. Specifically, Guild argues that GAF's use of the name "WNCN Listeners' Club" for the station's promotional organization in such a way as to be confusing with Guild's own name was done deliberately and with the sole purpose of putting pressure on Guild to withdraw its complaints about WNCN. However, Guild contends that, rather than focusing on this alleged pattern of abuse of the Commission's processes, the Division misconstrued its argument as merely an attempt to resolve property rights in the name of a promotional organization that is confusingly similar to Guild's own name. Although the HDO notes that the Commission does not adjudicate intangible property rights, it also states, "Guild's accusation, that GAF has somehow abused the Commission's processes on the basis of the name that GAF has given to its listener organization, is totally unsupported and frivolous." *GAF Broadcasting Company, Inc.*, at 1746 ¶ 33. It is thus apparent that the Division did consider Guild's abuse of process arguments and rejected them. Guild provides no information in its petition to warrant further review of this matter.

7. Guild also argues that the HDO did not address the propriety of GAF's insistence on maintaining the terms of a confidentiality agreement between GAF and Guild relating to what Guild describes as non-proprietary information it wishes to bring to the Commission's attention. While this contention was not specifically addressed in the HDO, Guild's petition provides no information to enable the Commission to determine whether the terms of this agreement have any relevance to this proceeding. Therefore, based on the record before us, Guild has failed to demonstrate any reason for futher inquiry in this respect.

8. Finally, Guild has offered no basis for reconsidering the Division's failure to name it as a party to this proceeding. Guild's participation is premised on the specification of issues against GAF which Guild raised in a petition to deny the WNCN(FM) renewal application. Because the matters raised in the petition to deny were either rejected or referred to the EEO Branch for consideration, there is no justification, at this time, for making Guild a party to this proceeding. In light of the above, we will deny Guild's Petition for Reconsideration.

III. DISMISSAL OF COURT APPEAL

9. In an earlier order, the Commission denied various petitions and objections filed by Class and others against GAF's transfer of control application proposing a corporate reorganization. *Shareholders of GAF Corporation,* 7 FCC Rcd 3225 (1992). Class appealed that decision to the United States Court of Appeals for the District of Columbia Circuit, (No. 92-1269). Before us now is a joint request filed by GAF and Class to approve an agreement entered into by the parties in which Class agrees to dismiss its court appeal and withdraw its pending EEO related objections and comments in return for GAF's promise to pay Class $40,000.

10. Section 73.3588 of the Commission's Rules, 47 C.F.R. § 73.3588, provides for dismissal of petitions to deny or withdrawal of informal objections in exchange for financial consideration that does not exceed the legitimate and prudent expenses incurred by the dismissing/withdrawing party. Declarations are attached to the agreement demonstrating that GAF's payment is less than the legitimate and prudent expenses incurred by Class in preparing, filing, and prosecuting its appeal, petitions and objections in the applicable proceedings. Moreover, the Bureau has reviewed the settlement agreement and is satisfied that it meets the requirements of Section 73.3588 and is otherwise in the public interest. Based on the foregoing, we will grant the joint request and approve the Agreement for Dismissal of Court Appeal attached thereto.[6]

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[5] Section 309 states, in pertinent part, as follows:

> If, in the case of any application to which subsection (a) of this section applies, a substantial and material question of fact is presented or the Commission for any reason is unable to make the finding specified in such subsection, it shall formally designate the application for hearing on the ground or reasons then obtaining and shall forthwith notify the applicant and all other known parties in interest of such action and the ground and reasons therefor, specifying with particularity the matters and things in issue but not including issues or requirements phrased generally.

[6] The Bureau's support of this agreement is based "on the absence of any demonstrated linkage between disposition of the settlement agreement seeking dismissal of the Class appeal and

IV. DISMISSAL OF CLASS APPLICATION

11. In their Joint Motion for Approval of Agreement for Dismissal of Applicant, GAF and Class request (1) approval of their settlement agreement in which GAF promises to pay Class $40,000 in exchange for the dismissal of its application; (2) dismissal of Class' application and (3) grant of GAF's renewal application. GAF and Class state that they have filed their joint motion with the Commission, instead of the ALJ, because, this proceeding not yet having reached the Initial Decision stage, approval of their motion would require a waiver of Section 73.3523 of the Commission's Rules. 47 C.F.R. § 73.3523.

12. Prior to the filing of the applications in this proceeding, the Commission adopted Section 73.3523 to limit any renewal settlement reimbursements to an amount not exceeding the legitimate and prudent expenses of the party receiving the reimbursement, and then only if the dismissal or withdrawal occurs after the Initial Decision stage of the hearing. See 47 C.F.R. § 73.3523(c). Thus, the current rules ban *any and all* payments by a renewal applicant to a competing applicant in return for the withdrawal or dismissal of the competing application prior to the Initial Decision stage of the comparative hearing. See 47 C.F.R. § 73.3523(b). The rule was based on the Commission's recognition that the previous approval of settlement agreements had led to abuses of the renewal process clearly not in the public interest. *Formulation of Policies and Rules Relating to Broadcast Renewal Applicants, Competing Applicants, and Other Participants to the Comparative Renewal Process and to the Prevention of Abuses of the Renewal Process*, 4 FCC Rcd 4780, (1989). Specific abuses mentioned by the Commission are as follows:

> Incumbent licensees are required to expend considerable amounts of money to defend against and pay off challengers, including those who are unfunded and have no real intention of owning or operating a station. Moreover, the staff and management of the incumbent are forced to spend considerable funds as well as time and effort opposing challenges to license renewals. The expenditure of such resources that otherwise might have been devoted to programming and other services, to defend against an abusive challenge is inefficient and wasteful. Non *bona fide* challenges may also discourage *bona fide* competing applicants and unnecessarily drain Commission resources. (Internal cites omitted).

4 FCC Rcd at 4782 ¶ 22.

13. The petitioners argue, however, that a waiver is warranted in this case because Class' application does not reflect the type of abusive behavior Section 73.3513(c) was designed to discourage. Thus, petitioners contend that Class' application was filed on April 30, 1991 in the sincere belief that GAF was not qualified to be a Commission licensee. This belief was predicated on the conviction of GAF's parent company and one of its former officers for criminal violations of federal securities law. Nonetheless, on March 18, 1991 the judgments of conviction in the appeals case referred to above were reversed and the case was remanded for a new trial. *U.S. v. GAF Corporation, et. al.*, 928 F.2d 1253 (2d Cir. 1991). On August 9, 1991, the U.S. Attorney's office for the Southern District of New York announced that it would not seek a new trial. Subsequently the Commission rejected the argument that the questions raised by the alleged misconduct still warranted consideration by the Commission. See *Shareholders of GAF Corporation*, 7 FCC Rcd at 3230-31 ¶ ¶ 20-23.

14. Petitioners argue that changed circumstances beyond Class' control, i.e., the termination of the criminal proceedings and the Commission's rejection, in *Shareholders of GAF Corporation*, of the arguments that the criminal allegations demonstrated that GAF lacked the basic character qualfications to be a licensee, dramatically altered Class' chances of winning in this comparative renewal proceeding. Based on those changes of circumstance, Class and GAF argue that their settlement agreement, which would resolve all aspects of this proceeding, should be approved in accordance with the Commission's general support of such efforts. Nor, they argue, would approval of the settlement establish any broad precedent since the key factor in the grant of such relief would be changes in material circumstances outside the control of the dismissing applicant. Finally, petitioners assert that Class' application was not filed for the purpose of reaching a settlement agreement and that the proposed reimbursement is substantially less than 100% of Class' fees and expenses.

15. The Bureau opposes the settlement motion arguing that it is self-serving, does not advance the public interest, and is inconsistent with the Commission's policy proscribing the reimbursement of expenses in comparative renewal proceedings such as this one. The Bureau submits that the convictions were overturned on March 18, 1991, before Class filed its application, and that the termination of the criminal proceeding occurred on August 9, 1991, long before the release of the HDO in this case and before Class voluntarily filed its Notice of Appearance on April 1, 1993, representing that it intended to appear and present evidence in this proceeding. Thus, the Bureau argues that the petitioners' claim that Class has only recently concluded that the changed circumstances have undermined the basis upon which its application was filed, is untenable.

16. Although we realize that settlement agreements may be beneficial to the public interest, we do not believe that the one before us should be approved. Section 73.3523, discussed above, was intended to eliminate some of the abuses of the Commission's renewal process. The key factor offered by Class and GAF in their joint motion for a waiver of that rule is that the termination of the criminal proceeding against GAF and the Commission's decision in *Shareholders of GAF Corporation* constitute significant changes in circumstances over which Class had no control. We do not believe that the termination of criminal proceedings on August 9, 1991 and the Commission's subsequent denial of arguments that GAF lacked the basic qualifications to be a licensee based on the criminal allegations constitute changed circumstances sufficient to justify a waiver of Section 73.3523.

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disposition of the settlement agreement seeking dismissal of the captioned Class application." Our review of the agreement reveals no such "linkage" and we predicate our approval of the agreement on the absence of any such actual relationship.

17. At the time Class filed its competing application in this proceeding, it was on notice by virtue of Section 73.3523 that it would not be entitled to any reimbursement of expenses should it decide to withdraw its application before an Initial Decision was released. It also had notice, prior to filing its application, that the Commission's general policy is not to take cognizance of non-FCC misconduct, such as the allegations against GAF, unless there has been an ultimate adjudication by an appropriate trier of fact. *Policy Regarding Character Qualifications in Broadcast Licensing,* 102 FCC 2d 1179, 1204-1206 ¶ 48 (1986). Finally, at that time Class knew that there was no ultimate adjudication against GAF and indeed it knew that the District Court's tentative adverse findings against GAF had been set aside by the Court of Appeals. Accordingly, Class knew, or should have known that, under existing policy, the allegations against GAF would be given no consideration in this proceeding. Thus, although petitioners claim that there have been significant changes in circumstances in this proceeding due to the termination of the criminal proceedings and the Commission's decision in *Shareholders of GAF Corporation,* in fact there has been no change at all. Given the absence of a final adjudication of the criminal proceedings, the Commission, in *Shareholders,* merely implemented its well established policy, and thus, its decision was not in any way unexpected. In addition, to grant a waiver of the rule merely because some hoped for change in Commission policy did not occur would be directly contrary to the policy underlying the rule which is intended to force a challenger to fully evaluate the legal strength of its case *before* filing. See *Formation of Policies,* 4 FCC Rcd at 4784 ¶ 30. Thus, petitioners' reliance on the circumstances concerning the disposition of the allegations against GAF provides no basis for a grant of the relief requested. Having provided no other grounds that would not be present in any acceptable settlement submitted after release of an Initial Decision to support a waiver of Section 73.3523, we agree with the Bureau that on these facts petitioners' proposed settlement agreement must be rejected in light of the Commission's policy proscribing the reimbursement of expenses in comparative renewal proceedings prior to the release of an Initial Decision.

V. MOTION TO STAY

18. GAF and Class have filed a motion requesting that we stay the hearing proceedings herein until August 23, 1993, to allow for processing of the Joint Motion for Approval of Agreement for Dismissal of Application filed simultaneously therewith. In light of our action herein denying the joint motion, we will dismiss the motion to stay as moot.

VI. RENEWAL EXPECTANCY

19. Although not specifically argued by the parties, there is a matter that warrants further comment in the context of the case before us. In *Policy Regarding Character Qualifications in Broadcast Licensing,* 102 FCC 2d 1179, 1232 (1986), the Commission held that consideration of facts concerning character that would not lead to disqualification "would no longer be a relevant criterion in comparative renewal proceedings." However, the Commission also stated the following:

> Our action today in no way prejudges consideration of compliance with the Communications Act and/or the Commission's rules and policies as it may relate to an incumbent's past broadcast record in the context of acquiring a legitimate renewal expectancy. For example, violations of the Communications [Act] or a specific commission rule or policy may militate against the finding of a meritorious record (internal citation omitted).

102 FCC 2d at 1232 fn 125.

20. To the extent that there may be ambiguity about our policy, we wish to emphasize that in comparative renewal proceedings, allegations involving a licensee's violation of the Act, rules or policies can be relevant in the determination of the weight to be given to a licensee's claim to renewal expectancy. See *Central Florida Enterprises, Inc. v. FCC,* 194 U.S. App. D.C. 118, 133 (1978); see also *Cowles Broadcasting, Inc.,* 86 FCC 2d 993, 1017 (1981), where the Commission held that violations of its rules "tend to rebut the inference derived from a record of substantial service that the licensee will continue to serve the public in a meritorious manner."

21. From the above, it would appear that alleged violations of the Commission's EEO rules, for example, if they raise a *prima facie* question about compliance with the rules, might be pertinent to the ALJ's determination of GAF's entitlement to a renewal expectancy, even if no qualifying EEO issue were designated against GAF. For this reason, we will direct the Mass Media Bureau's EEO Branch to expedite its analysis of the allegations that GAF violated our EEO rules presently pending before it. See paragraphs 4-5, above. Consistent with paragraphs 19 and 20 above, the ALJ may allow consideration in this proceeding of any EEO deficiencies either as a basic qualifying matter or in connection with the determinations concerning GAF's renewal expectancy. In doing so, the ALJ will thus have discretion to add an issue, if appropriate, to resolve disputed facts concerning any such deficiencies in GAF's EEO program and practices that may relate to the renewal expectancy determination. See *Metroplex Communications, Inc.,* 4 FCC Rcd 8149, 8163 fn.11 (Rev. Bd. 1989) rev. den.5 FCC Rcd 5610 (1990).

22. ACCORDINGLY, IT IS ORDERED That the Request for Dismissal of Motion for Deferral filed June 21, 1993 by GAF Broadcasting Company, Inc. IS GRANTED and the Motion for Deferral of Procedural Dates filed April 12, 1993, by The Fidelio Group, Inc. and the Mass Media Bureau's Motion to Dismiss filed April 16, 1993, ARE DISMISSED, as moot.

23. IT IS FURTHER ORDERED That the Petition for Reconsideration filed April 14, 1993 by Listeners' Guild, Inc., IS DENIED.

24. IT IS FURTHER ORDERED That the Joint Request for Approval of Agreement for Dismissal of Court Appeal filed June 15, 1993 by GAF Broadcasting Company, Inc. and Class Entertainment and Communications, L.P. IS GRANTED and the attached settlement agreement IS APPROVED.

25. IT IS FURTHER ORDERED That the Joint Motion for Approval of Agreement for Dismissal of Applicant filed June 23, 1993 by GAF Broadcasting Company, Inc. and Class Entertainment and Communications, L.P. IS DENIED.

26. IT IS FURTHER ORDERED That the Joint Motion to Stay Proceeding Pending Action on Settlement Agreement filed June 23, 1933 by GAF Broadcasting Company, Inc. and Class Entertainment and Communications, L.P. IS DISMISSED, as moot.

27. IT IS FURTHER ORDERED That the Mass Media Bureau's EEO Branch IS DIRECTED to expedite its review and analysis of WNCN's equal employment performance and the allegations of EEO violations raised by petitions to deny presently pending before the Branch.

28. IT IS FURTHER ORDERED That the Mass Media Bureau is directed to report the actions, analysis and reasoning of the EEO Branch in a written pleading filed with the ALJ in this proceeding as expeditiously as possible following action by the EEO Branch.

29. IT IS FURTHER ORDERED That the Request for Expedited Action filed by GAF Broadcasting Company, Inc. on August 2, 1993, IS GRANTED.

FEDERAL COMMUNICATIONS COMMISSION

William F. Caton
Acting Secretary

Before the
Federal Communications Commission
Washington, D.C. 20554

In re Application of

MAINES BROADCASTING, INC. File No. BMPH-871211IG
WMRX(FM), Beaverton, Michigan

For Waiver of the Main Studio Rule

MEMORANDUM OPINION AND ORDER

Adopted: July 28, 1993; Released: August 16, 1993

By the Commission:

1. The Commission has before it an application for review, filed April 12, 1990, by Maines Broadcasting, Inc. ("Maines"), appealing the Chief, Audio Services Division, Mass Media Bureau's ("Bureau") denial of its request for waiver of the Commission's main studio rule, 47 C.F.R. § 73.1125.

2. *Background.* Maines is the licensee of Station WMRX(FM), Beaverton, Michigan. Maines requested waiver of Section 73.1125 of the rules in order to permit WMRX(FM) to co-locate its main studio with that of co-owned station WMPX(AM), in Midland, Michigan.[1] Midland is 20 miles from Beaverton, WMRX(FM)'s city of license, and lies approximately 11 miles outside the principal community (3.16 mV/m) contour of WMRX(FM).[2] In its waiver request, Maines states that no member of the public had visited the Beaverton studio during its ownership and that the Midland production facilities are "superior to anything in place at the Beaverton studio."[3] *Id.* at 5. Additionally, Maines contends that the current personnel cost of maintaining the Beaverton studio with one staff member is nearly $10,000 per year, and thus is a substantial burden for a station with monthly revenues of $6,000-7,500. Maines notes that in Docket 86-406 the Commission "recognized that substantial costs may be imposed by requiring a station to maintain a studio in its community of license and that these costs may restrict the station's ability to provide more or better programming." *Id.* Waiver of the rule, states Maines, would result in the elimination of the one Beaverton staff person, but this staff reduction would be offset by the employment of a part-time community affairs director who would report on Beaverton affairs and by the institution of full-time programming service.[4] Finally, Maines cites two Commission findings in the *Report and Order:* (i) that "the physical location of a main studio in the city of license may not increase interaction between local residents and the station"; and (ii) that flexibility should be accorded broadcasters due to the "development of transmission and production technology which has occurred in recent years." Waiver request, at 4.

3. The Bureau denied the waiver request on July 14, 1988. *Letter to Radio Station WMRX(FM),* reference 8920-DM, (Chief, Audio Services Division). The Bureau held that the provisions of the new main studio rule remained a means for insuring that the needs and interests of citizens of a station's community of license are met and that the station serves as an outlet for local self expression. The Bureau indicated that, in granting waiver requests under the former rule analogous to that presented here, applicants were required first to demonstrate the unavailability of a suitable site within the geographic boundary prescribed in the rules and, thereafter, public interest reasons for moving outside that boundary. Thus, the Bureau held that applicants seeking waiver of the main studio rule currently must demonstrate that: (i) there are no suitable studio locations within the station's principal community contour; and (ii) allowing such an operation at variance with the Commission's relaxed main studio rule advances the public interest. Finally, citing *WAVY Television, Inc.,* 102 FCC 2d 1538 (1985) (*"WAVY"*), the Bureau stated that, in the absence of a detailed showing of special circumstances, it is contrary to established Commission policy to authorize by such waivers the move of a community's broadcast station to a central city of substantially greater size (in this case, from Beaverton, with a population of 1000, to Midland, with a population of over 35,000). The Bureau found that Maines made none of the required showings and denied the waiver request.

4. In its petition for reconsideration, filed August 15, 1988, Maines argued that: (i) there are no sites within its community which will alleviate the financial burdens of locating the WMRX studio in Beaverton; (ii) the production superiority at the Midland studio would allow it to present higher quality programming to Beaverton without originating programming there; (iii) grant of the waiver would enable WMRX to save money and redirect station resources to full-time programming for Beaverton; and (iv) *WAVY,* the case cited by the Bureau to prohibit relocation of WMRX to a larger community, predated the relaxation of the main studio rule and therefore is irrelevant.

5. The Bureau denied reconsideration on March 13, 1990. *Letter To Maines Broadcasting, Inc.,* reference 8920-MSR (Chief, Audio Services Division). It held that: (i) Maines still had not demonstrated that suitable sites were not available within its principal community contour; and (ii) it had provided no detailed showing of special circumstances which would warrant Commission approval for moving station operations to Midland, a city 35 times larger than Beaverton. The Bureau further stated that while the principal community contour standard was adopted to afford broadcast stations greater flexibility, it was also de-

[1] On June 1, 1987, in the *Report and Order* in MM Docket No. 86-406, 2 FCC Rcd 3215 (1987) (*"Report and Order"), recon. and clarification granted in part,* 3 FCC Rcd 5024 (1988) (*"Reconsideration"*), the Commission amended Section 73.1125 to permit an FM station's main studio to be located anywhere within its principal community (3.16 mV/m) contour. Previously, the main studio was required to be located within the community of license.

[2] Conversely, Beaverton lies approximately 10 miles outside WMPX(AM)'s principal community (5 mV/m) contour.

[3] The Midland studio currently also serves as WMRX(FM)'s auxiliary studio.

[4] Maines indicates that WMRX(FM) currently broadcasts for 18 hours each day.

signed to ensure that the studio remain within the station's market and near the community of license. Given the respective sizes of the communities and the 20-mile distance between them, the Bureau concluded, grant of Maines' waiver request would likely lead to derogation of WMRX(FM)'s service obligations to Beaverton. Finally, the Bureau reaffirmed the relevance of the *WAVY* policy with respect to relocation to a larger city outside the principal community contour.

6. In its application for review, Maines resubmits the arguments contained in its petition for reconsideration. In this regard, it states that grant of its waiver request would not lead to the derogation of service to Beaverton but would in fact permit the station "to provide a much *more* 'meaningful presence' to Beaverton residents" by the hiring of a part-time community affairs director who would report on matters of significance to Beaverton. Application, at 6. Studio accessibility would not be affected, as no member of the public has ever visited the studio, and "what is most important is a radio station's presence in a community by its signal and its programming, not an office or studio. The station will continue to place a premium signal in Beaverton ... because its transmitter and antenna tower are located within Beaverton." *Id.* at 7. Additionally, Maines cautions that it is not in the public interest for the Commission to "pursue a slavish devotion to a strict application of the rules when such an application would not promote the public interest," as "the Commission's rule in practice merely requires a station to squander its scarce resources to pay an employee to sit in an office awaiting a public which never comes." *Id.* at 8. Finally, Maines states that the present situation is "causing a drain on the station's resources which could be better spent on additional benefits to the public. No other sites within the community can ameliorate these financial conditions." *Id.*

7. *Discussion.* For the reasons set forth below, we deny the Maines application for review. The provisions of 47 C.F.R. § 73.1125 are intended to be a means of assuring that the needs and interests of residents of a broadcast station's community of license are met and that the station serves as an outlet for local self-expression. The policy of requiring a readily accessible main studio has long been seen to be an integral means by which the Commission facilitates service to a community of license. *See FM-TV Main Studio Moves*, 27 FCC 2d 851, 852 (1971). Contrary to the implication in Maines' original waiver request, the Commission did not abandon this policy in the 1987 main studio rules revision promulgated by the *Report and Order* in Docket 86-406. Rather, we found that, in light of changes which had occurred in technology, the marketplace, and our regulations, the existing studio location standard "was unduly restrictive and [could] be modified without affecting the station's ability to serve its community of license." 2 FCC Rcd at 3218. Additionally, we noted that

> [t]he principal community contour standard will afford stations additional flexibility ... but will insure that the studio remains within the station's market and near its community of license ... Exposure to daily community activities and other local media of communications helps stations identify community needs and interests, which is necessary to operate in today's competitive marketplace and to meet our community service requirements. In addition, the studio will be accessible to community residents participating in those local programs that, at the broadcaster's option, are produced at the studio.

Id. See also Reconsideration, 3 FCC Rcd at 5026 ("[T]he main studio is still expected to facilitate the key function of serving the needs and interests of the station's community of license"). Further, we have expressed the continued importance of the main studio rule in achieving key regulatory goals, especially in areas in which we have undertaken substantial deregulation. *See Report and Order* in MM Docket 82-320, 93 FCC 2d 436, 456 (1983); *Report and Order* in MM Docket 86-406, 2 FCC Rcd at 3218.

8. Although the Commission in the past has allowed a station to locate its main studio outside the geographic boundary prescribed in the rule, it has done so only upon a showing of good cause. *See* 47 C.F.R. § 73.1125(a)(3) (1983 ed.). Under the former rule, waiver requests involving circumstances analogous to the circumstances presented here were granted only if the applicant first demonstrated the unavailability of a suitable site within the designated boundary and, thereafter, public interest reasons for moving outside of it. *See WAVY*, 102 FCC 2d 1538; *Jackson County Broadcasting, Inc.*, 45 RR 2d 1723 (1979); *South St. Paul Broadcasting Co.*, 43 FCC 2d 600 (1973). We believe that, given the increased flexibility in studio location accorded licensees under the revised main studio rules, requiring that applicants for waiver initially demonstrate the unavailability of studio sites within the principal community contour is a reasonable threshold requirement for waiver of the rules, absent other uniquely compelling reasons for waiver. Accordingly, we believe this case law remains relevant.

9. Maines does not meet the main studio waiver test. As noted above, Maines claims that staffing the Beaverton studio with one person during normal business hours causes a financial drain on the station when the money could be better spent "on additional benefits to the public. No other sites within the community can ameliorate these financial conditions." However, the WMRX(FM) studio need not be located in Beaverton but can be placed anywhere within the station's principal community contour, including a potentially cost-effective location at its transmitter site. We determined in the *Report and Order* that "[a]ll stations will now be permitted to obtain the efficiencies to be realized by collocating the station's studio at its transmitter site. Program line costs may be significantly reduced by eliminating the need for auxiliary microwave and common carrier connections between studios and transmitters." 2 FCC Rcd at 3218. Given the flexibility and efficiency accorded licensees under the studio rules revisions, coupled with the importance of the main studio in our broadcast licensing scheme, we find that Maines' economic argument is insufficient to justify a waiver -- either as showing that other sites within the principal community contour are unavailable or as a uniquely compelling matter. We also do not find that arguments regarding the production superiority of the Midland studio and the possible redirection of resources toward community programming services are compelling. Maines' obligation is (and has been) to serve the needs and interests of Beaverton residents from a fully equipped and accessible main studio in the Beaverton vicinity; it may not use a promise to begin to fulfill that existing obligation to support a waiver.

10. Finally, we note that Maines' arguments based upon costs associated with staffing the studio in its community of license reveal an apparent problem with its present operation of WMRX(FM). Maines is concerned about the costs of keeping one staff person in Beaverton when all broadcast operations are from Midland. Thus, it appears that WMRX may not be in compliance with the "full-time managerial and full-time staff" main studio personnel requirements recently enunciated in *Jones Eastern of the Outer Banks, Inc.*, 6 FCC Rcd 3615 (1991), *recon. and clarification granted in part*, 7 FCC Rcd 6800 (1992). In fact, it appears that Maines may have shifted virtually the entire WMRX operation from Beaverton to Midland. Because of possible uncertainty regarding main studio staffing requirements prior to the release of the *Jones Eastern* decisions, however, we will admonish WMRX to insure that its Beaverton studio facilities comply with current Commission standards. The focus of WMRX(FM)'s operations should be service and accessibility to Beaverton, not Midland, and the station should be operated accordingly. In this regard, we also note that the Commission's main studio requirements set forth in the *Reconsideration* require "production and transmission facilities that meet applicable standards," maintaining continuous transmission capability, and maintaining a meaningful management and staff presence in Beaverton. 3 FCC Rcd at 5026.

11. In light of the above, Maines's application for review IS HEREBY DENIED, and the station is cautioned to bring its operations into compliance with all pertinent main studio rules and policies within 60 days of the release of this document.

FEDERAL COMMUNICATIONS COMMISSION

William F. Caton
Acting Secretary

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of the Application of

Peter W. & Molly W. Moncure d/b/a Mountain Tower — File No. 9279-CM-P-83

For Authority to Construct and Operate a Multichannel Multipoint Distribution Service station on the F-group channels at New York, NY

MEMORANDUM OPINION AND ORDER

Adopted: July 30, 1993; Released: August 16, 1993

By the Chief Domestic Facilities Division:

1. *Introduction.* Peter W. & Molly W. Moncure d/b/a Mountain Tower (Tower) filed a petition for reconsideration of the determination by the Domestic Facilities Division (Division) that the above-referenced application to construct and operate a Multichannel Multipoint Distribution Service (MMDS) station on the F-group channels at New York, NY was unacceptable for filing.

2. *Division Return.* The Division determined that Tower's application was unacceptable for filing because it failed: (1) to make a showing of how interference with the operation of adjacent channels would be avoided and what steps the applicant has taken to comply with § 21.902(a), pursuant to 47 C.F.R. § 21.901(d)(7); (2) to specify audio carrier frequencies in question 6, Form 435; and (3) to provide any antenna information in question 9, Form 435. The omission of this information in Tower's application rendered the application incomplete and not in a "condition acceptable for filing". Therefore, Tower's application was returned as unacceptable for filing.

3. *Petition.* Tower resubmitted its application stating that the deficiencies had been cured and requesting that its application be reinstated *nunc pro tunc*. First, regarding the showing required by 47 C.F.R. § 21.901(d)(7), Tower stated that its application listed all cochannel and adjacent-channel stations of record at the time of filing, and that it did not expect its station to cause objectional interference to any of them. In the petition, Tower stated that it pledged to address any interference to existing or future station with all techniques proposed in Docket 80-113, and others as may apply. However, Tower did not describe the specific techniques it would use to avoid interference or the steps it would take to comply with § 21.902(a). Second, Tower requested leave to amend its application to correct the frequency information in question 6, Form 435 and to supply the missing antenna data in question 9, Form 435. However Tower still did not specify the audio carrier frequencies it intended to used at its proposed station.

4. *Discussion.* Prior to the filing of any MMDS application, the Commission declared that each MMDS applicant had to submit, as part of its application, a specific technical interference protection showing for cochannel and adjacent-channel stations.[1] To effectuate its decision, the Commission added 47 C.F.R. § 21.901(d)(7) to the Commission's rules.[2] Similarly, the consequences of failing to provide this demonstration was unequivocally stated.

> We stress again that we expect applicants to address this problem in their applications. *Those applications that do not contain an analysis of how the applicant intends to avoid cochannel interference in adjacent areas will not be considered acceptable for filing.*

MMDS Allocation Order, 94 FCC 2d at 1264 (emphasis in original)

5. This interference protection showing is a significant requirement because the Commission, in reallocating spectrum from the Instructional Television Fixed Service (ITFS) to MMDS, did so with the understanding that certain adjacent-channel interference problems might arise, *Id* at 1246.[3] Many of those commenting on the MMDS reallocation proposal expressed the view that such operations were not technically feasible using existing MDS or ITFS equipment. Others expressed the view that such operations were feasible, but the stations had to be carefully engineered.[4] A prospective MMDS licensee's ability to pro-

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[1] *Amendment of Parts 2, 21, 74, and 94 of the Commission's Rules and Regulations with regard to frequency allocation to the Instructional Television Fixed Service, the Multipoint Distribution Service, and the Private Operational Fixed Microwave Service*, 94 FCC 2d 1203, 1247, 1264 (1983) (*MMDS Allocation Order*).

[2] This rule provision requires each MMDS applicant to show how interference with the operation of adjacent channels would be avoided and to show what steps had been taken to comply with 47 C.F.R. § 21.902(a). Section 21.902(a) requires, *inter alia*, MDS applicants to make exceptional efforts to avoid blocking potential adjacent-channel use in the same city and cochannel use in nearby cities. "To assist us in enforcing Section 21.902(a)... the applicant must explain what efforts it has made to comply with this section." *Id.* at 1264.

[3] The assignment of the four E channels to one station and the four F channels to another station "has the disadvantage that wide spread adjacent channel interference could occur if the transmitters of the two operators are not colocated." *Id.* at 1264. "[T]he use of channels in one pair of an interleaved group [such as the E-group] tends to preclude use of the other group [such as the F-group] in the same area." *Id.* For this reason, the Commission emphasized that it would "require each applicant to include, as part of its application, an analysis of the potential for adjacent channel interference with a non-colocated licensee operating on the interleaved channel group." *Id.* at 1247.

[4] To mitigate the effects of the problem of "gridlock", the Commission decided to group MMDS applications for lottery, where possible, according to Metropolitan Statistical Areas (MSAs), Consolidated Metropolitan Statistical Areas (CMSAs) or New England Consolidated Metropolitan Areas (NECMAs) in which the MMDS transmitter sites were located. "Gridlock" is the situation in which a large number of applications are filed in multiple adjacent areas resulting in all the applications being considered mutually exclusive. Although this lottery grouping method eliminates the "gridlock' problem where there are statistical areas, it can result in some cochannel stations being

vide interference protection to other cochannel or adjacent channel licensees was an integral part of the Commission's reallocation plan. Toward that end, the technical showing required by Section 21.901(d)(7) served as a means of determining an applicant's awareness of potential interference problems and technical competence to offer MMDS by resolving potential interference problems with other cochannel or adjacent-channel stations operating within 50 miles or the radio horizon of a proposed MMDS transmitter site.[5] This is particularly important because, at the time Tower filed its application, MMDS applications for immediately adjacent areas were filed on the same day, without the submission of interference analyses which are usually required for applications proposing cochannel and adjacent-channel stations located within 50 miles or the radio horizon. *Id.* at 1265.[6] See 47 C.F.R. § 21.902(c).[7]

6. For the same reasons, it is important that an applicant file a complete application form providing all necessary information including the carrier frequencies on which the station will operate and the antenna on which the station will transmit. This information provides both the Commission and the MMDS entities with fundamental technical data necessary to determine whether the proposed station can operate in a non-interference manner. When Tower failed to provide in its application the required information regarding the audio carrier frequencies on which it planned to operate and its transmitting antenna, it violated 47 C.F.R. § 21.13(a)(2) which ensures that all of the necessary information required on the Commission's forms, and found necessary to conduct its administrative functions, be provided by each applicant.

7. The *MMDS Allocation Order* prescribed the filing requirements to be observed by MMDS applicants. The order specifically stated that "all applications are expected to comply with all pertinent sections of Part 21, including those we are adopting today...." *Id.* at 1238. Each MMDS applicant is required to demonstrate its technical qualifications to be an MMDS license. 47 C.F.R. § 21.13. Tower failed to submit the necessary interference protection showing required by Section 21.901(d)(7). In addition, Tower failed to submit the information required by the Commission's rules, requests, and application forms pertaining to carrier frequencies and the transmitter antenna to be used. These omissions rendered the application defective, and, therefore, not in a "condition acceptable for filing".[8] Thus, the application was returned as defective and unacceptable for filing in accordance with 47 C.F.R. § 21.20(a).[9]

8. *Conclusion.* Having carefully considered all of the above arguments and evidence submitted by Tower, we find that it was proper for the Division to return Tower's application as defective and unacceptable for filing, and reconsideration and reinstatement *nunc pro tunc*, along with curative amendments, is not warranted. Accordingly, Tower's request for reconsideration and restatement of the above-referenced application IS DENIED. This order is issued pursuant to 47 C.F.R. § 0.291 and it effective on its release date. See 47 C.F.R. §§ 1.4(b), 1.106, and 1.115.

FEDERAL COMMUNICATIONS COMMISSION

James R. Keegan
Chief, Domestic Facilities Division
Common Carrier Bureau

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spaced more closely than would be allowed by traditional rules for determining the potential for harmful interference. *Id.* at 1264.

[5] "In those situations where [statistical areas]... are so close that a single transmitter could produce a signal strong enough to cause harmful interference in both [statistical areas], we require that each applicant... detail what steps it will take to prevent blocking cochannel use in the adjacent" statistical area. *Id.* at 1264.

[6] The Commission waived for all MMDS applicants filing on the initial filing date the requirement that applicants file the interference analyses required by 47 C.F.R. § 21.902(c).

[7] "Because it is possible that two new MDS construction [authorizations] will be granted simultaneously in some markets, and because it is possible that MDS or ITFS operations in markets that are in close proximity may present potential interference problems, it will be difficult for applications to comply fully with Section 21.902(a)." *Id.* at 1265.

[8] In item 33 of its application, Tower admitted that it did not have a copy of the current Commission rules and relied on a photocopy of out-of-date rules. Any applicant who "either ignores or fails to understand clear and valid rules of the Commission respecting the requirements for an application assumes the risk that the application will not be acceptable for filing." *Ranger v. FCC*, 294 F.2d 240, 242 (1961). Tower's showing in its application demonstrated that it failed to understand the difference between, on one hand, the previously proposed and existing ITFS stations, and on the other hand, MMDS proposals to be filed concurrently with the filing of Tower's application. Furthermore, Tower failed to observe the requirement to file complete application forms. Tower's failure to comprehend and comply with the filing standards that all MMDS applicants are required to meet cannot be used to avoid the consequences of its failure.

[9] See *Amendment of Parts 1 and 21 of the Commission's Rules and Regulations Applicable to the Domestic Public Services (Other than Maritime)*, 60 FCC 2d 549 (1976); see also *Revision of Part 21 of The Commission's Rules*, 2 FCC Rcd 5713 (1987).

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of the Application of

Earl V. Levels File No. 7021-CM-P-83

For Authority to Construct and
Operate a Multichannel Multipoint
Distribution Service station on
channels E-1 and E-2 at
San Francisco, CA

MEMORANDUM OPINION AND ORDER

Adopted: July 30, 1993; Released: August 16, 1993

By the Chief Domestic Facilities Division:

1. *Introduction.* Earl V. Levels (Levels) filed a petition for reconsideration of the determination by the Domestic Facilities Division (Division) that his above-referenced application to construct and operate a Multichannel Multipoint Distribution Service (MMDS) station on the E-1 and E-2 channels at San Francisco, CA was unacceptable for filing.

2. *Division Return.* The Division determined that Levels' application was unacceptable for filing because it failed to make a showing of how interference with the operation of adjacent channels would be avoided and what steps the applicant has taken to comply with § 21.902(a), pursuant to 47 C.F.R. § 21.901(d)(7). In addition, the application contained several other deficiencies.[1] The omission of this information rendered the application defective, and, therefore, not in a "condition acceptable for filing", pursuant to 47 C.F.R. § 21.20.

3. *Petition.* Levels filed a request for reconsideration and reinstatement *nunc pro tunc,* and amendments to the application. Regarding the showing required by 47 C.F.R. § 21.901(d)(7), Levels stated, in these amendments, that the antenna of his station would be modified to avoid interference with ITFS frequencies. However, he did not provide a detailed analysis describing the specific techniques he would use to avoid interference or the steps he would take to comply with § 21.902(a). In addition, on reconsideration, Levels provided some, but not all of the other missing information which he should have filed with his application.

4. *Discussion.* Prior to the filing of any MMDS application, the Commission declared that each MMDS applicant had to submit, as part of its application, a specific technical interference protection showing for cochannel and adjacent-channel stations.[2] To effectuate its decision, the Commission added 47 C.F.R. § 21.901(d)(7) to the Commission's rules.[3] Similarly, the consequences of failing to provide this demonstration was unequivocally stated.

> We stress again that we expect applicants to address this problem in their applications. *Those applications that do not contain an analysis of how the applicant intends to avoid cochannel interference in adjacent areas will not be considered acceptable for filing.*

MMDS Allocation Order, 94 FCC 2d at 1264 (emphasis in original)

5. This interference protection showing is a significant requirement because the Commission, in reallocating spectrum from the Instructional Television Fixed Service (ITFS) to MMDS, did so with the understanding that certain adjacent-channel interference problems might arise, *Id* at 1246.[4] Many of those commenting on the MMDS reallocation proposal expressed the view that such operations were not technically feasible using existing MDS or ITFS equipment. Others expressed the view that such operations were feasible, but the stations had to be carefully engineered.[5] A prospective MMDS licensee's ability to provide interference protection to other cochannel or adjacent channel licensees was an integral part of the Commission's

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[1] The deficiencies cited were the absence of: (1) the description of program input facilities and studio equipment required in item 17, Form 435, and pursuant to 47 C.F.R. §§ 21.13(a) and 21.903; (2) detailed construction costs in item 19 Form 435; (3) a public interest statement in item 22, Form 435, and pursuant to 47 C.F.R. § 21.13(a)(4); (4) maintenance information in item 24, Form 435, and pursuant to 47 C.F.R. § 21.15(e); and (5) current financial qualification data in question 17(a), Form 435 and pursuant to 47 C.F.R. 21.17.

[2] *Amendment of Parts 2, 21, 74, and 94 of the Commission's Rules and Regulations with regard to frequency allocation to the Instructional Television Fixed Service, the Multipoint Distribution Service, and the Private Operational Fixed Microwave Service,* 94 FCC 2d 1203, 1247, 1264 (1983) (*MMDS Allocation Order).*

[3] This rule provision requires each MMDS applicant to show how interference with the operation of adjacent channels would be avoided and to show what steps had been taken to comply with 47 C.F.R. § 21.902(a). Section 21.902(a) requires, *inter alia,* MDS applicants to make exceptional efforts to avoid blocking potential adjacent-channel use in the same city and cochannel use in nearby cities. "To assist us in enforcing Section 21.902(a)... the applicant must explain what efforts it has made to comply with this section." *Id.* at 1264.

[4] The assignment of the four E channels to one station and the four F channels to another station "has the disadvantage that wide spread adjacent channel interference could occur if the transmitters of the two operators are not colocated." *Id.* at 1264. "[T]he use of channels in one pair of an interleaved group [such as the E-group] tends to preclude use of the other group [such as the F-group] in the same area." *Id.* For this reason, the Commission emphasized that it would "require each applicant to include, as part of its application, an analysis of the potential for adjacent channel interference with a non-colocated licensee operating on the interleaved channel group." *Id.* at 1247.

[5] To mitigate the effects of the problem of "gridlock", the Commission decided to group MMDS applications for lottery, where possible, according to Metropolitan Statistical Areas (MSAs), Consolidated Metropolitan Statistical Areas (CMSAs) or New England Consolidated Metropolitan Areas (NECMAs) in which the MMDS transmitter sites were located. "Gridlock" is the situation in which a large number of applications are filed in multiple adjacent areas resulting in all the applications being considered mutually exclusive. Although this lottery grouping method eliminates the "gridlock' problem where there are statistical areas, it can result in some cochannel stations being spaced more closely than would be allowed by traditional rules for determining the potential for harmful interference. *Id.* at 1264.

reallocation plan. Toward that end, the technical showing required by Section 21.901(d)(7) served as a means of determining an applicant's awareness of potential interference problems and technical competence to offer MMDS by resolving potential interference problems with other cochannel or adjacent-channel stations operating within 50 miles or the radio horizon of a proposed MMDS transmitter site.[6] This is particularly important because, at the time Levels filed his application, MMDS applications for immediately adjacent areas were filed on the same day, without the submission of interference analyses which are usually required for applications proposing cochannel and adjacent-channel stations located within 50 miles or the radio horizon. *Id.* at 1265.[7] See 47 C.F.R. § 21.902(c).[8]

6. In addition, it is important that an applicant file a complete application form providing all necessary information including that information necessary for evaluation of the applicant's qualifications to be a MMDS licensee. Without this information, the Commission cannot make the public interest determination that the applicant is legally, technically and financially qualified to be a licensee. *See also* 47 C.F.R. § 21.13(a).

7. The *MMDS Allocation Order* prescribed the filing requirements to be observed by MMDS applicants. The order specifically stated that "all applications are expected to comply with all pertinent sections of Part 21, including those we are adopting today...." *Id.* at 1238. Each MMDS applicant is required to demonstrate its technical qualifications to be an MMDS license. 47 C.F.R. § 21.13. Levels failed to submit the necessary interference protection showing required by Section 21.901(d)(7). In addition, Levels failed to submit other information required by the Commission's rules, requests, and applications forms that is necessary to evaluate his qualifications to be a MMDS licensee. These omissions rendered the application defective and not in a "condition acceptable for filing".[9] Thus, the application was returned as unacceptable for filing,[10] in accordance with 47 C.F.R. § 21.20(a).

8. *Conclusion.* Having carefully considered all of the above arguments and evidence submitted by Levels, we find that it was proper for the Division to return Tower's application as unacceptable for filing, and reconsideration and reinstatement *nunc pro tunc,* along with curative amendments, is not warranted. Accordingly, Levels' request for reconsideration and restatement of the above-referenced application IS DENIED. This order is issued pursuant to 47 C.F.R. § 0.291 and it effective on its release date. See 47 C.F.R. §§ 1.4(b), 1.106, and 1.115.

FEDERAL COMMUNICATIONS COMMISSION

James R. Keegan
Chief, Domestic Facilities Division
Common Carrier Bureau

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[6] "In those situations where [statistical areas]... are so close that a single transmitter could produce a signal strong enough to cause harmful interference in both [statistical areas], we require that each applicant... detail what steps it will take to prevent blocking cochannel use in the adjacent" statistical area. *Id.* at 1264.

[7] The Commission waived for all MMDS applicants filing on the initial filing date the requirement that applicants file the interference analyses required by 47 C.F.R. § 21.902(c).

[8] "Because it is possible that two new MDS construction [authorizations] will be granted simultaneously in some markets, and because it is possible that MDS or ITFS operations in markets that are in close proximity may present potential interference problems, it will be difficult for applications to comply fully with Section 21.902(a)." *Id.* at 1265.

[9] In items 33 and 36 of his application, Levels acknowledged that he was familiar with Part 21 of the Commission's rules that are relevant to MMDS. Any applicant who "either ignores or fails to understand clear and valid rules of the Commission respecting the requirements for an application assumes the risk that the application will not be acceptable for filing." *Ranger v. FCC,* 294 F.2d 240, 242 (1961). Levels' showing in his application demonstrated that he failed to understand the difference between, on one hand, the previously proposed and existing ITFS stations, and, on the other hand, MMDS proposals to be filed concurrently with the filing of his application. Furthermore, Levels failed to observe the requirement to file complete application forms. Levels' failure to comprehend and comply with the filing standards that all MMDS applicants are required to meet cannot be used to avoid the consequences of his failure.

[10] See *Amendment of Parts 1 and 21 of the Commission's Rules and Regulations Applicable to the Domestic Public Services (Other than Maritime),* 60 FCC 2d 549 (1976); see also *Revision of Part 21 of The Commission's Rules,* 2 FCC Rcd 5713 (1987).

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of the Application of

Multichannel Distribution of America — File No. 417-CM-P-83

For Authority to Construct and Operate a Multichannel Multipoint Distribution Service station on the E-group channels at Brainerd, Minnesota

MEMORANDUM OPINION AND ORDER

Adopted: July 30, 1993; Released: August 16, 1993

By the Chief Domestic Facilities Division:

1. *Introduction.* Multichannel Distribution of America (MDA) filed a petition for reconsideration of the dismissal by the Domestic Facilities Division (Division) on delegated authority of its application for authority to construct and operate a Multichannel Multipoint Distribution Service (MMDS) station on the E-group channels at Brainerd, MN, and for reinstatement of the application. For the reasons discussed below, we deny the petition.

2. *Background.* As the result of a Commission lottery, the above-referenced application was selected for qualification review. Subsequently, Division staff initiated a qualification review of the application pursuant to 47 C.F.R. § 21.32, and upon examination, found the application contained several deficiencies that precluded the staff from making a finding that MDA was legally, technically, financially, and otherwise qualified to be a licensee, and that grant of its application would serve the public interest. MDA was notified by letter of these deficiencies[1] and provided an opportunity to cure them within thirty (30) days of the date of the deficiency letter. In the deficiency letter, MDA was also advised that failure to file the requested information within thirty days could result in the dismissal of its application.

3. More than a year after the thirty day period had expired, MDA submitted a response providing some, but not all, of the information necessary to complete the processing of its application. Pursuant to Sections 21.13(c), 21.20(d), and 21.28(d), the Division dismissed MDA's application for failure to comply completely in a timely manner with the Division's request for information. On reconsideration, MDA argues that its application should be reinstated because the requested information was filed with the Commission by the date of the dismissal letter.

4. *Discussion.* As of the date of the Division's dismissal action, MDA still had not submitted all of the information necessary for evaluation of its qualifications to be an MMDS license. For example, MDA had not submitted a lease, lease option agreement, or other "concrete evidence" to determine the availability of its proposed transmitter site, as required by Sec. 21.15(a).[2] In its response to our deficiency letter, MDA stated that it had not yet executed a lease agreement with respect to its proposed transmitter site and that it would not execute the lease until the Commission issued it a conditional license. The Commission has stated that, for MMDS applications subject to the Commission's lottery proceedings, a demonstration of reasonable assurance of site availability is sufficient prior to lottery. However, once the lottery is held, a fully-executed lease, lease option agreement, or other concrete evidence of site availability must be submitted.[3] *Video/Multipoint, Inc.*, 6 FCC Rcd 5125, 5126 (Comm. Car. Bur. 1991).

5. According to MDA, before our dismissal action, it had filed with the Commission's mail room, along with other information, a document which it claims is a "lease option" agreement for site availability. The complete text of this document consists of the following statement: "This is to confirm that we agree to consider granting tower space to MDA, Inc. upon terms and conditions acceptable to both parties to be negotiated in the future". The document is addressed to MDA and is signed by the general manager of the company who owns the antenna site. We disagree with MDA's characterization of this document as a "lease option" agreement. Instead, it merely expresses the possibility that a lease agreement may be negotiated at some future date, if space is available and the parties can agree on contract terms. In the meantime, the statement does not prevent the owner of the site from leasing all the remain-

[1] The deficiencies cited were the absence of: (1) a lease or lease option agreement, pursuant to 47 C.F.R. § 21.15(a); (2) a Federal Aviation Administration (FAA) study to demonstrate air navigation hazard program compliance, as required by 47 C.F.R. §§ 17.4(f) and 21.15(d); (3) the orientation of the directional transmit antenna (degree of azimuth) in item 7, Form 435; (4) current financial data, pursuant to 47 C.F.R. 21.17(b); (5) type accepted transmitters under Part 21 in item 8, Form 435, and pursuant to 47 C.F.R. § 21.120; (6) a non-affiliation statement, pursuant to 47 C.F.R. § 21.900; (7) maintenance information, pursuant to 47 C.F.R. § 21.15(e); (8) correct carrier frequencies in item 6, Form 435, and pursuant to 47 C.F.R. § 21.907(a); and (9) an analysis demonstrating a lack of harmful interference to Instructional Television Fixed Service (ITFS) licensees, pursuant to 47 C.F.R. § 21.902(i).

[2] Even if MDA was not required to comply with the requirements of Section 21.15(a), it was required, under Section 21.13(c), to submit a lease or lease option agreement after the Division directed it to do so. Section 21.13(a) provides, *inter alia*, "In addition to the general application requirements of §§ 21.13 through 21.17 of this part, applicants shall submit any additional documents, exhibits, or signed written statements of fact: ... (2) As the Commission, at any time after the filing of an application ... may require from any applicant ... to enable it to determine whether a radio authorization should be granted ...."

[3] *Revision of Part 21 of The Commission's Rules*, 2 FCC Rcd 5713, 5721 (1987) ("We conclude that our rule as currently written should not be changed. ... Therefore, when selection between mutually-exclusive applications is by the random selection process, it shall be sufficient if the application adequately demonstrates reasonable assurance of the availability of the site. A license will not be granted, however, until concrete evidence of site availability is submitted." *Id.*)

ing space at the site to parties, other than MDA. Moreover, the document has none of the basic elements of a contract. There is no consideration expressed in the document, neither party is bound, and neither party is liable for damages for breach. The document specifies no terms, not even the expiration date of the "option". Thus, we find that MDA failed to demonstrate "concrete evidence" of the availability of the site as required by Section 21.15(a).

6. In addition, despite the deficiency letter statement that "FCC has no record of proposed antenna structure" and the request for MDA to "submit a copy of the FAA study", MDA failed to do so. Thus, MDA's response failed to comply with the Division's request for a copy of the required FAA study.[4] Also, MDA failed to provide the detailed maintenance information required by 47 C.F.R. § 21.15(e).

7. Regarding MDA's financial qualifications, MDA claims to have filed a financial certification along with the purported "lease option" agreement several days before our dismissal action. However, at the time of the deficiency letter, Section 21.17 required applicants to file a balance sheet current within 90 days and copies of any financial commitments or loan arrangements pertaining to the station facilities. *See Krisar, Inc.*, 7 FCC Rcd 8005 (Comm. Car. Bur. 1992). Instead, in its response letter submitted a year latter, MDA stated that it was relying on a customer to provide financing, but gave no further details of the arrangement and furnished no documentation of the customer's commitment to build the station. In any event, MDA failed to submit the requested current financial qualification data within thirty days of the date of the deficiency letter as well as any other documentation requested by the Commission.

8. MDA had a duty to submit curative amendments to its application within thirty days of the Division's written request, or to obtain an extension of time. *VisionAire, Inc.*, 5 FCC Rcd 1952 (Comm. Car. Bur. 1990). Its failure to submit all of the curative amendments for more than 30 months substantially impeded the expeditious offering of MMDS at Brainerd. Also MDA's failure to respond in a timely manner to the Division's request for information hindered the discharge of the Commission's statutory-imposed duties under Title III of the Communication's Act. *See By Direction of the Commission Letter to US West*, 60 Rad. Reg. 2d 8, 9 (1985). At the time of the dismissal, MDA had not provided the required lease or lease option agreement, the required FAA study and the required maintenance information. The Division was not in a position, therefore, to complete evaluation of MDA's MMDS station proposal and its qualifications to be an MMDS license. *Multi-Point Television Distributors, Inc.*, 5 FCC Rcd 519, 520 (Comm. Car. Bur. 1990).

9. *Conclusion.* Having carefully considered all the arguments and evidence presented, we find that dismissal of this application for failure to comply with the Division's request for information was proper, reconsideration of that action is not warranted, and reinstatement of the application is not justified. Accordingly, IT IS ORDERED that the reconsideration petition filed by Multichannel Distribution of America regarding the above-referenced MMDS application IS DENIED. This order is issued pursuant to 47 C.F.R. § 0.291, and is effective on its release date. *See* 47 C.F.R. §§ 1.4(b), 1.106, and 1.115.

FEDERAL COMMUNICATIONS COMMISSION

James R. Keegan
Chief, Domestic Facilities Division
Common Carrier Bureau

[4] Even if MDA was not required to comply with the requirements of Sections 17.4 and 21.15(d), it was required, pursuant to Section 21.13(c), to submit in a timely manner the required FAA study after the Division directed it to do so.

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of the Application of

Multichannel Distribution of America — File No. 773-CM-P-83

For Authority to Construct and Operate a Multichannel Multipoint Distribution Service station on the E-group channels at Waycross, Georgia

MEMORANDUM OPINION AND ORDER

Adopted: July 30, 1993; Released: August 16, 1993

By the Chief Domestic Facilities Division:

1. *Introduction.* Multichannel Distribution of America (MDA) filed a petition for reconsideration of the dismissal by the Domestic Facilities Division (Division) on delegated authority of its application for authority to construct and operate a Multichannel Multipoint Distribution Service (MMDS) station on the E-group channels at Waycross, MN, and for reinstatement of the application. For the reasons discussed below, we deny the petition.

2. *Background.* MDA filed the only application for authority to construct a new MMDS station on the E-group channel at Waycross, GA. Subsequently, Division staff initiated a qualification review of the application pursuant to 47 C.F.R. § 21.32, and upon examination, found the application contained several deficiencies that precluded the staff from making a finding that MDA was legally, technically, financially, and otherwise qualified to be a licensee, and that a grant of its application would serve the public interest. MDA was notified by letter of these deficiencies[1] and provided an opportunity to cure them within thirty (30) days of the date of the deficiency letter. In the deficiency letter, MDA was also advised that failure to file the requested information within thirty days could result in the dismissal of its application.

3. Almost four months after the thirty day period had expired, MDA submitted a letter providing some, but not all, of the information necessary to complete processing of its application. Pursuant to Sections 21.13(c), 21.20(d), and 21.28(d), the Division dismissed MDA's application for failure to comply completely in a timely manner with the Division's request for information. On reconsideration, MDA argues that its application should be reinstated because the requested information was filed with the Commission by the date of the dismissal letter.

4. *Discussion.* As of the date of the Division's dismissal action, MDA still had not submitted all of the information necessary for evaluation of its qualifications to be an MMDS license. For example, MDA had not submitted a lease, lease option agreement, or other "concrete evidence" to determine the availability of its proposed transmitter site, as required by Sec. 21.15(a).[2] In its response to our deficiency letter, MDA stated that it had not yet executed a lease agreement with respect to its proposed transmitter site and that it would not execute the lease until the Commission issued it a conditional license. The Commission has stated that, for MMDS applications subject to the Commission's lottery proceedings, a demonstration of reasonable assurance of site availability is sufficient prior to lottery. However, once the lottery is held, or in the case of a sole application filed for an area, a fully-executed lease, lease option agreement, or other concrete evidence of site availability must be submitted.[3] *Video/Multipoint, Inc.*, 6 FCC Rcd 5125, 5126 (Comm. Car. Bur. 1991).

5. According to MDA, several months before our dismissal action, it filed with the Commission a document, along with other information,[4] which it claims is a "lease option" agreement. This document consisted of a letter addressed to MDA and signed by an individual with the

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[1] The deficiencies cited were the absence of: (1) a lease or lease option agreement, pursuant to 47 C.F.R. §§ 21.15(a); (2) a certification of financial qualifications, pursuant to 47 C.F.R. § 21.17; (3) maintenance information, pursuant to 47 C.F.R. §21.15(e); (4) correct antenna structure height information, pursuant to 47 C.F.R. §§ 21.15(c) and (d); (5) the orientation of the directional transmit antenna (degrees of azimuth) in item 7, Form 435; (6) type accepted transmitters under Part 21 in item 8, Form 435, and pursuant to 47 C.F.R. § 21.120; (7) correct carrier frequencies in item 6, Form 435, and pursuant to 47 C.F.R. § 21.907(a); and (8) an analysis demonstrating a lack of harmful interference to Instructional Television Fixed Service (ITFS) licensees, pursuant to 47 C.F.R. § 21.902(i).

[2] Even if MDA was not required to comply with the requirements of Section 21.15(a), it was required, under Section 21.13(c), to submit a lease or lease option agreement after the Division directed it to do so. Section 21.13(a) provides, *inter alia*, "In addition to the general application requirements of §§ 21.13 through 21.17 of this part, applicants shall submit any additional documents, exhibits, or signed written statements of fact: ... (2) As the Commission, at any time after the filing of an application ... may require from any applicant ... to enable it to determine whether a radio authorization should be granted ...."

[3] *Revision of Part 21 of The Commission's Rules*, 2 FCC Rcd 5713, 5721 (1987) ("We conclude that our rule as currently written should not be changed. ... Therefore, when selection between mutually-exclusive applications is by the random selection process, it shall be sufficient if the application adequately demonstrates reasonable assurance of the availability of the site. A license will not be granted, however, until concrete evidence of site availability is submitted." *Id.*)

[4] The other information included a certification of applicant's financial qualifications and the first page of the FCC Form 435 with the corrected carrier frequencies. MDA filed a copy of these documents with its petition for reconsideration. In its petition, MDA stated that it did not have a "stamped in" copy of these filings, because it used "regular" mail. It further stated that it could not prove that it submitted the information before we took our dismissal action.

An applicant has the burden to show that a document was received by the FCC, when receipt is disputed. If "regular" mail is used, the applicant must submit proof that the mailed document was properly addressed to the FCC, had sufficient postage, and was deposited in the mail. *See Hughes-Moore Associates, Inc.*, 7 FCC Rcd 1454 (1992).

title of manager. The document fails to identify the company for whom the manager works and merely states the purpose of the letter is to confirm the manager's understanding that MDA is granted a option to lease a tower space for mounting MDA's antenna. The document then states that a final agreement will be executed prior to commencement of construction. We disagree with MDA's characterization of this document as a "lease option" agreement. Instead, it merely represents an agreement to be negotiated at some future date, if space is available and the parties can agree on contract terms. In the meantime, the document does not prevent the owner of the site from leasing all the remaining space at the site to parties, other than MDA. Moreover, the document has none of the basic elements of a contract. The parties are not properly identified in the document, no consideration is expressed in the document, neither party is bound, and neither party is liable for damages for breach. The document specifies no terms, not even the expiration date of the "option". Thus, we find that MDA failed to demonstrate "concrete evidence" of the availability of the site as required by Section 21.15(a).

6. Moreover, MDA failed to submit the requested financial certification as of the date of the Division's dismissal action. Instead, in its response, MDA stated that it was relying on a customer to provide financing, but gave no further details of the arrangement and furnished no documentation of the customer's commitment to build the station. MDA also failed to provide the correct carrier frequencies, pursuant to 47 C.F.R. § 21.907(a).[5] Finally, MDA failed to provide the detailed maintenance information required by 47 C.F.R. § 21.15(e).

7. MDA had a duty to submit curative amendments to its application within thirty days of the Division's written request, or to obtain an extension of time. *VisionAire, Inc.*, 5 FCC Rcd 1952 (Comm. Car. Bur. 1990). Its failure to submit curative amendments for more than eleven months substantially impeded the expeditious offering of MMDS at Waycross. Also MDA's failure to respond in a timely manner to the Division's request for information hindered the discharge of the Commission's statutory-imposed duties under Title III of the Communication's Act. *See By Direction of the Commission Letter to US West*, 60 Rad. Reg. 2d 8, 9 (1985). At the time of the dismissal, MDA had not provided the required lease or lease option agreement, the required financial certification, the required carrier frequencies, and the required maintenance information. The Division was not in a position, therefore, to complete evaluation of MDA's MMDS station proposal and its qualifications to be an MMDS license. *Multi-Point Television Distributors, Inc.*, 5 FCC Rcd 519, 520 (Comm. Car. Bur. 1990).

8. *Conclusion*. Having carefully considered all the arguments and evidence presented, we find that dismissal of this application for failure to comply with the Division's request for information was proper, reconsideration of that action is not warranted, and reinstatement of the application is not justified. Accordingly, IT IS ORDERED that the reconsideration petition filed by Multichannel Distribution of America regarding the above-referenced MMDS application IS DENIED. This order is issued pursuant to 47 C.F.R. § 0.291, and is effective on its release date. *See* 47 C.F.R. §§ 1.4(b), 1.106, and 1.115.

FEDERAL COMMUNICATIONS COMMISSION

James R. Keegan
Chief, Domestic Facilities Division
Common Carrier Bureau

[5] *See* Footnote 4, *supra*.

Before the
Federal Communications Commission
Washington, D.C. 20554

LETTER
August 9, 1993

Released: August 16, 1993

CERTIFIED MAIL - RETURN RECEIPT REQUESTED

Mr. Dennis Miga
Managing Partner
Matrix Telecom
9003 Airport Freeway, Suite 340
Fort Worth, Texas 76180

Dear Mr. Miga:

This constitutes a letter of admonition issued to Matrix Telecom (Matrix) pursuant to authority contained in Section 4(i) of the Communications Act of 1934, as amended, 47 U.S.C. § 154(i), because of a letter of agency (LOA) that Matrix used to convert consumers' long distance telephone service to its network.

The Commission received a complaint alleging that the complainant's long distance telephone service was switched from Sprint Communications Company L.P. to Matrix without his authorization. On December 28, 1992, the Informal Complaints Branch of the Common Carrier Bureau (Bureau) served a Notice of Informal Complaint (NOIC) on Matrix and Pacific Bell, the complainant's local exchange carrier, pursuant to Section 208 of the Communications Act, 47 U.S.C. § 208, and Section 1.711 of the Commission's Rules, 47 C.F.R. § 1.711. Under Section 1.717 of the Commission's Rules, 47 C.F.R. § 1.717, Matrix and Pacific Bell were directed to investigate the complaint and to advise the Commission in writing, with a copy to the complainant, of their satisfaction of the complaint or their refusal or inability to do so.

On January 30, 1993, Matrix responded to the NOIC. The Matrix response states that the complainant signed an LOA requesting Matrix's service and that the complainant is responsible for all charges billed while he was subscribed to Matrix's service. Matrix provided the Branch with a document ("the Matrix document") that it describes as an LOA, allegedly signed by the complainant.

The Matrix document is formatted primarily as an entry form to help community "kids" through the entrant's participating in a drawing for a cellular phone and airline tickets, rather than as a request to change long distance carriers.[1] The signature block on the Matrix document appears right after the information about the drawing. The Matrix document also has a large drawing of a football helmet and the phrases "SACRAMENTO SURGE" and "KIDS AT RISK FOUNDATION" in very large, bold print. The information that is in bold print has nothing to do with conversion of an entrant's service to Matrix's long distance service. Consequently, some consumers may have been misled by the Matrix document and may have been persuaded to sign this document because of its primary focus on winning a prize and helping children.

The end of the Matrix document does contain a statement in small print that the signor of the document would be a participant in Care Network's Matrix long distance service.[2] The language contained in this portion of the document, however, does not appear to meet the Commission's minimal LOA conditions set forth in the *Investigation of Access and Divestiture Related Tariffs*, CC Docket No. 83-1145, 101 FCC 2d 911 (1985) (*Allocation Order*).[3]

Based upon its review of the Matrix response and documents, the Bureau is concerned about Matrix's compliance with the Commission's LOA procedures.[4] In particular, it appears that the Matrix document does not contain language specifying: (1) that the customer designates Matrix to act as the customer's agent for the presubscription process; (2) that the consumer understands that only one Interexchange Carrier (IXC) may be designated as the customer's primary IXC for any one telephone number and that selection of multiple carriers will invalidate all such selections; (3) that the customer understands that any primary IXC selection after the initial one will involve a charge to the customer; and (4) the telephone number(s) for which the primary IXC is being designated.

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[1] The Matrix document states, in pertinent part:

> YES, I would like to participate in the drawing for a cellular phone and airline tickets. I understand that I am also signing up to help kids in the community through a special program that will not cost me anything. I understand that I must be 18 years or older to participate.

[2] The Matrix document states, in pertinent part:

> I will be billed through my local phone company and my rate will not go up as a result of this program. Please sign me up. I want The Care Network to arrange for my residential long-distance service.

[3] The *Allocation Order* established the following procedures for changing primary interexchange carriers (IXCs):

> 10. All IXCs may seek customer commitments to use their services and designate them as their primary IXC. All such commitments must be supported by a statement signed by the customer, which at a minimum recognizes these conditions.
>
> 10.1 The customer designates the IXC to act as the customer's agent for the presubscription process.
>
> 10.2 The customer understands that only one IXC may be designated as the customer's primary IXC for any one telephone number and that selection of multiple carriers will invalidate all such selections.
>
> 10.3 The customer understands that any primary IXC selection after the initial one will involve a charge to the customer.
>
> 10.4 The specific telephone number(s) for which the primary IXC is being designated must be listed.

Allocation Order, 101 FCC 2d at 929.

[4] *Id.*

The Matrix document falls short of the Commission's expectation of an LOA. Therefore, we strongly admonish Matrix regarding the use of this document, and others like it, to convert consumers' telephone service to its network. We expect Matrix to take immediate remedial steps to destroy all blank LOAs to convert consumers' long distance service to Matrix service that contain offers or inducements that are unrelated to a change in a customer's long distance service. This remedial action extends to Matrix and its officers, agents, affiliates and other persons acting for or employed by Matrix. Also, we expect Matrix to take the necessary actions to ensure that the dissemination and use of LOAs not in compliance with the Commission's procedures are not repeated. Further, we direct Matrix to submit to the Bureau an LOA that is in compliance with the Commission's LOA procedures. We will review the submitted LOA to ensure that the LOA is in compliance with the Commission's LOA procedures set forth in the *Allocation Order*.

The Matrix document states that the signor's rates will not go up as a result of the program described in the document.[5] Matrix is directed to explain in detail how it can guarantee that customers' rates will not increase over the rates of their existing carrier. If the rates of Matrix are higher, Matrix is directed to explain: (1) whether or not it re-rates each call to the rate of the carrier providing service to the customer before being switched to Matrix; (2) whether the rates for such calls are re-rated before a bill is issued to consumers; or (3) whether it re-rates the calls only upon receipt of a complaint.

Matrix has thirty (30) days from the release date of this letter to submit to the Bureau in writing the following: (1) a statement of the corrective action that it has taken regarding the matters addressed in this letter; (2) the information specified above regarding its rates; and (3) an LOA that is in compliance with the Commission's LOA procedures set forth in the *Allocation Order*. The written response should reference IC-93-08366.

We caution Matrix that further actions of the nature described herein may result in a finding that Section 201(b) of the Communications Act, 47 U.S.C. § 201(b), has been violated and may lead to show cause and/or forfeiture proceedings.

FEDERAL COMMUNICATIONS COMMISSION

Kathleen B. Levitz
Acting Chief, Common Carrier Bureau

[5] See note 2, *Supra*.

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

Liability of
Bay Television, Inc.

Licensee of Television
Station WTTA(TV),
St. Petersburg, Florida,

for a Forfeiture

MEMORANDUM OPINION AND ORDER

Adopted: August 9, 1993; Released: August 16, 1993

By the Chief, Mass Media Bureau:

1. The Commission, by the Chief of the Mass Media Bureau acting pursuant to authority delegated by Section 0.283 of the Commission's Rules, has under consideration (1) a $10,000 Notice of Apparent Liability (NAL) issued January 15, 1993,[1] to Bay Television, Inc., licensee of Television Station WTTA(TV), St. Petersburg, FL, and (2) the licensee's response to the NAL, dated February 5, 1993, asking that the forfeiture be reduced or rescinded.

2. The NAL was issued for repeated violations of 47 C.F.R. § 73.670, which limits the amount of commercial time that may be included in children's television programming. The licensee argues that the amount of the forfeiture is excessive considering the circumstances of this case and the Commission's treatment of other licensees that violated the same rule.

3. The licensee has admitted that two one-hour blocks of WTTA's children's programming broadcast on Thursday, January 16, 1992, contained more than the 12 minutes per hour of commercial time allowed in weekday children's programming. By explaining that the overages (2.5 minutes and 1.5 minutes, respectively) occurred because the traffic manager did not realize that the limits applied both to bartered commercial time and to locally inserted commercials, and that most of WTTA's children's programming aired during January 1992 was barter programming that included space for more commercial matter than may now be broadcast, the licensee has also admitted that similar overages occurred on other days until the misunderstanding was corrected at some point prior to receiving our letter of inquiry of June 16, 1992.

4. The licensee contends that other licensees claiming to have misunderstood the rule early in 1992, when it first went into effect, were treated more leniently than Bay Television. As examples, the licensee points to our admonition issued to WTBS(TV) and to our dismissal of the case against KWGN-TV.[2] We believe, however, these cases can easily be distinguished. WTBS's misunderstanding was a failure to anticipate that the Commission's definition of commercial time, "air time sold for purposes of selling a product," would encompass free announcements promoting co-owned commercial interests. The situation of "cross-promotionals" such as these had never been directly addressed in the rule or in any of the interpretive documents issued by the Commission in implementation of the Children's Television Act of 1990. *See Report and Order*, 6 FCC Rcd 2111 (1991), and *Memorandum Opinion and Order*, 6 FCC Rcd 5093 (1991). Accordingly, we issued no forfeitures for violations based on that misunderstanding. In contrast, WTTA's traffic manager apparently failed to understand what had been clearly stated in the rule and in both of the above-mentioned interpretive documents: commercial time includes all "air time sold for purposes of selling a product." There was no language indicating that "sold" applied strictly to the local station as opposed to program producers or suppliers and, moreover, there were specific discussions of bartered programming and the circumstances under which its receipt by the station would not be "valuable consideration." *See Report and Order*, 6 FCC Rcd at 2123, n.19; and *Memorandum Opinion and Order*, 6 FCC Rcd at 5094-95. WTTA's misunderstanding was in no way attributable to an absence of recent discussion of the issue.

5. In the case of KWGN-TV, a misunderstanding of our rule led to one overage of 30 seconds. The Commission took no adverse action against the licensee, not because of the nature of the misunderstanding,[3] but because it resulted in an isolated and inadvertent infraction. In contrast, WTTA's misunderstanding led to a number of violations that could not be excused as *de mimimis*.

6. The licensee also mentions the case of WAYK(TV)'s admonition.[4] The Commission chose not to impose a forfeiture against a former licensee, as it would serve no deterrent purpose. The station's claim of new management and understaffing were immaterial to this decision. Similarly, WTTA(TV)'s claim of lack of experience was not considered a reason to excuse its violations.

7. As a final example of lenient treatment, Bay Television cites our admonition to KITV(TV)[5] in Honolulu. KITV chose to run certain children's programming on a delayed basis because of the time differences between Hawaii and the mainland source of its programs, but failed to realize that beginning certain programs on the half hour instead of on the hour would change the commercial tally for the clock hour in a significant way. Bay Television states that WTTA's "purely inadvertent" mistake leading to overages is at least as excusable as KITV's "purely

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[1] *See Bay Television, Inc.*, 8 FCC Rcd 412 (MMB 1993).

[2] *See SuperStation, Inc. (WTBS(TV))*, 8 FCC Rcd 490 (MMB Enf. Div. 1993), and *WGN of Colorado, Inc. (KWGN-TV)*, 8 FCC Rcd 489 (MMB Enf. Div. 1993).

[3] The issue, involving bonus spots as part of a larger sponsorship package, had been directly addressed in the above-mentioned interpretive documents, so that if a failure to take this into account had led to substantial violations, these would not have been excused.

[4] *George E. Mills, Jr., Trustee*, 8 FCC Rcd 487 (MMB Enf. Div. 1993).

[5] *Tak Communications, Inc., D.I.P.*, 8 FCC Rcd 488 (MMB Enf. Div. 1993).

voluntary" decision which it should have foreseen might result in violations of the clock hour commercial limits. Using this logic, however, one could conclude that WTTA should have foreseen that hiring an inexperienced traffic manager might result in commercial overages. It is more appropriate to compare the unique situation in Hawaii that justified our allowing KITV (in effect) a longer period to adjust to the new rules, and the unique situation in WTTA's case -- its lack of experience in broadcasting and its employee's unfamiliarity with, or failure to understand, the rule in question. In the latter case, Commission precedent requires that these arguments be rejected. *See, e.g., Springtown Educational Broadcasting Foundation,* 7 FCC Rcd 2588 (MMB 1992).

8. The licensee further argues that it does not deserve a forfeiture in the same amount as that issued to WFTS-TV for repeatedly broadcasting "children's program length commercials."[6] By airing GI Joe toy commercials during a 30-minute GI Joe cartoon, WFTS-TV, according to our construct, broadcast 30 minutes of commercial time during children's programming. WTTA's commercial overages of 2.5 minutes and less were not as egregious, Bay Television contends, and the amount of the forfeiture should be adjusted accordingly. We disagree that using such computations can realistically compare the severity of the cases, which involve two different types of violative conduct. In adopting the Children's Television Act of 1990, Congress determined that overexposure to commercial matter is harmful to children, and it clearly intended that commercial overages of 1.5 minutes be deemed significant.[7] The Commission accordingly adopted rules to implement the statutory limits for commercial time set forth in the Act. Congress also charged the Commission with defining program-length commercials in the context of children's programming.[8] Citing the confusion to children resulting from the failure to maintain a clear separation between program and commercial matter, the Commission defined children's program length commercials in a way that brought such matter within reach of the time limits in our children's commercialization rules. *See Report and Order, supra,* 6 FCC Rcd at 2117-18. Thus, the Commission determined that interweaving program and commercial material in certain situations, long considered a violation of our policy against "host-selling" and related practices, would now be considered a rule violation subject to the sanctions available for simple overages. To accept WTTA's argument would indicate a result clearly contrary to Congressional intent – that only a children's program-length commercial is a significant enough violation to warrant a basic forfeiture. Accordingly, we find the argument unpersuasive.

9. The licensee also argues for a reduction based on its past history of compliance, this being its first violation of Commission rules. We reject Bay Television's compliance history as a reason to reduce the forfeiture. The guidelines described in our *Policy Statement, Standards for Assessing Forfeitures,* 6 FCC Rcd 4695 (1991), *on recon.,* 7 FCC Rcd 5339 (1992), *pet. for review pending sub nom. USTA v. FCC,* No. 92-1321 (D.C. Cir. filed July 30, 1992), contemplate that a downward adjustment may be warranted because of a station's history of conduct. WTTA, as a new station, cannot claim such a history.

10. Accordingly, we deny the licensee's request for a reduced forfeiture. Pursuant to Section 503(b) of the Communications Act of 1934, as amended, IT IS ORDERED, that Bay Television, Inc., licensee of Television Station WTTA(TV), St. Petersburg, FL, FORFEIT to the United States the sum of Ten Thousand Dollars ($10,000) for repeated violations of 47 C.F.R. § 73.670. Payment of the forfeiture may be made by mailing to the Commission a check or similar instrument payable to the Federal Communications Commission. In regard to this forfeiture proceeding, the licensee may take any of the actions set forth in Section 1.80 of the Commission's Rules, as summarized in the attachment to this Memorandum Opinion and Order.

FEDERAL COMMUNICATIONS COMMISSION

Roy J. Stewart
Chief, Mass Media Bureau

[6] *See Tampa Bay Television, Inc.,* 8 FCC Rcd 411 (MMB 1993).

[7] "The Congess finds that . . . special safeguards are appropriate to protect children from overcommercialization on television . . . ." 47 U.S.C. § 303a note. "[E]ach commercial television broadcast licensee [and cable operator] shall limit the duration of advertising in children's television programming to not more than 10.5 minutes per hour on weekends and not more than 12 minutes per hour on weekdays." 47 U.S.C. § 303a(b).

[8] "Program Length Commercial Matter. Within 180 days after the date of enactment of this Act, the Commission shall complete the proceeding known as Revision of Programming and Commercialization Policies, Ascertainment Requirements and Program Log Requirements for Commercial Television Stations,' MM Docket No. 83-670." Children's Television Act of 1990, Pub. L. 101-437, 104 Stat. 996, § 104.

Before the
Federal Communications Commission
Washington, D.C. 20554

LETTER
August 9, 1993

Released: August 16, 1993

CERTIFIED MAIL, RETURN RECEIPT REQUESTED

John T. Lynch, President 8310MGK
Noble Broadcast of Houston, Inc. 92110102
Licensee, Station KMJQ-FM
24 Greenway Plaza #1508
Houston, TX 77046-2402

Dear Mr. Lynch:

This letter constitutes a NOTICE OF APPARENT LIABILITY FOR A FORFEITURE, pursuant to Section 503(b) of the Communications Act of 1934, as amended.

By letter of July 19, 1993, we inquired into a possible violation by Station KMJQ-FM of Section 73.1207 of the Commission's Rules. Section 73.1207, in pertinent part, prohibits broadcast stations from retransmitting the program, or any part thereof, of another broadcast station without the express authority of the originating station. Our letter detailed allegations that Station KMJQ personnel had recorded a challenge and song originally aired on Station KBXX-FM and had rebroadcast the segment at least twice on Station KMJQ.[1] We mentioned further an allegation that Station KMJQ personnel had distributed taped copies of the rebroadcast at a local nightclub and at a parking lot near the Station KBXX studio.

Your reply of August 4, 1993, admits that the incidents in fact occurred and concedes the violations of Section 73.1207. You urge by way of mitigation that Station KMJQ was operating with an interim Acting Station Manager, that neither he nor his superiors authorized the off-air recording and rebroadcast, and that employees responsible for the incident were disciplined and in some cases dismissed. You also cite the station's record of compliance with Commission rules.

None of these considerations justifies a downward adjustment of the forfeiture, however. Station KMJQ management, whether interim or permanent, had an affirmative obligation to assure compliance with Commission rules. Merely avoiding direct approval of rule violations does not satisfy this obligation. Here particularly, where the rebroadcast was taped and copies publicly distributed, we cannot accept oversight or ignorance as an explanation, much less an excuse, for so clear a violation of our rules.

Accordingly, pursuant to Section 503(b) of the Communications Act, Noble Broadcast of Houston, Inc., is hereby advised of its apparent liability for a forfeiture of two thousand five hundred dollars ($2,500) for its apparent violation of Section 73.1207 of the Commission's Rules. The amount specified was determined by using the criteria set forth in the *Policy Statement, Standards for Assessing Forfeitures*, 6 FCC Rcd 4695 (1991), *on recon.*, 7 FCC Rcd 5339 (1992), *pet. for review pending sub nom., USTA v. FCC*, No. 92-1321 (D.C. Cir. filed July 30, 1992), and the factors set forth in Section 503(b)(2) of the Communications Act of 1934, as amended. The figure reflects a one thousand, two hundred, fifty dollar ($1,250) base for a miscellaneous violation of Commission rules, increased because the tape was rebroadcast twice.

In regard to this forfeiture proceeding, you are afforded a period of thirty (30) days from the date of this letter "to show, in writing, why a forfeiture penalty should not be imposed or should be reduced, or to pay the forfeiture. Any showing as to why the forfeiture should not be imposed or should be reduced shall include a detailed factual statement and such documentation and affidavits as may be pertinent." 47 U.S.C. Section 1.80(f)(3). Other relevant provisions of Section 1.80 are summarized in the attachment to this letter.

FEDERAL COMMUNICATIONS COMMISSION

Roy J. Stewart
Chief, Mass Media Bureau

[1] In the broadcast, Robert Scorpio, a Station KBXX disc jockey, announced that he would award $100 to any listener who heard the song he was about to play, "If I Ever Fall in Love Again" by the musical group Shy, on any other radio station that day, and brought Scorpio a recording of the broadcast. When Station KMJQ rebroadcast the segment, it urged listeners to record it and then take the tape to Station KBXX for a $100 payment. According to the complainant, over 40 individuals made claims as a result of KMJQ'S rebroadcast of the song and distribution of tapes of the rebroadcast. KBQQ issued checks to each of the 24 claimants who appeared at the station before midnight of the day on which the rebroadcasts were aired.

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of the Application of

HUGHES COMMUNICATIONS GALAXY, INC. File No. 49-DSS-ML-93

For Modification of Authority to Provide Intra-Caribbean Service

MEMORANDUM OPINION AND ORDER

Adopted: August 6, 1993; Released: August 17, 1993

By the Domestic Facilities Division:

1. Hughes Communications Galaxy, Inc. (Hughes) has applied to modify its authorization to provide intra-Caribbean satellite service.[1] Hughes is authorized to use two transponders on its Galaxy VI satellite to provide this service.[2] It is requesting authorization to allow the two transponders available for intra-Caribbean use to be located on any of its licensed domestic satellites.

2. In support of its application, Hughes states that it does not seek to expand the total capacity available at any one time for intra-Caribbean service but only wants to expand the range of satellites on which such service may be provided. It asserts that an expanded range would allow it more flexibility to serve customers and to respond to their changing needs.[3] Hughes states that it is not requesting any other changes in the terms and conditions of its authorization.

3. We find it is in the public interest to grant Hughes' request to afford it the ability to serve customers' needs with flexible service offerings. However, Hughes must successfully coordinate with adjacent domestic satellite operators before commencing intra-Caribbean operations on a particular satellite. In addition, as required by its previous authorization, Hughes must obtain information from the appropriate government or other INTELSAT signatory that obligations related to Article XIV of the INTELSAT Agreement have been fulfilled before it commences service pursuant to this authorization.[4]

4. Accordingly, IT IS ORDERED, pursuant to Section 0.291 of the Commission's rules on delegations of authority, that the application for modification of authorization (File No. 49-DSS-ML-93) filed by Hughes Communications Galaxy Inc. IS GRANTED, and Hughes is authorized to provide intra-Caribbean service on two of its transponders on any of its authorized satellites. The other terms and conditions of its intra-Caribbean authority remain the same.

5. IT IS FURTHER ORDERED that Hughes shall successfully complete coordination with adjacent U.S. domestic satellites before commencing service pursuant to this authorization.

6. Hughes Communications Galaxy, Inc. is afforded thirty days from the date of the release of this order to decline the authorization as conditioned. Failure to respond within that period will constitute formal acceptance of the authorization as conditioned.

FEDERAL COMMUNICATIONS COMMISSION

James R. Keegan
Chief, Domestic Facilities Division
Common Carrier Bureau

[1] Hughes' application was put on public notice and no comments were received. Report No. DS 1323 (June 23, 1993).

[2] *See* Hughes Communications Galaxy, 6 FCC Rcd 5257 (1991) (*Authorization Order*), modifying Western Union Telegraph Company, 60 Rad. Reg. 2d (P&F) 1659 (1986). Hughes was granted special temporary authority to continue intra-Caribbean service on its Galaxy VII(H) satellite after Galaxy VI is retired. Letter to Counsel, Hughes Communications Galaxy from Chief, Domestic Facilities Division (July 2, 1993).

[3] Western Union's original intra-Caribbean authority allowed it the flexibility to use any of its satellites to provide service.

[4] As stated in the *Authorization Order* at para 3, because this service does not involve points within the U.S., the Commission does not have to consider issues related to Article XIV.

Before the
Federal Communications Commission
Washington, D.C. 20554

PUBLIC NOTICE

Released: August 17, 1993

PLEADING CYCLE ESTABLISHED FOR COMMENTS ON GTE TELEPHONE OPERATING COMPANIES' PETITION FOR WAIVER OF PART 69 TO OFFER SWITCHED ACCESS DISCOUNTS

On August 3, 1993, GTE Telephone Operating Services (GTE) filed a petition requesting waiver of the Part 69 Rules. GTE proposes to offer customers additional switched access pricing options based upon term and/or growth commitments. The term plan would provide discounts for originating and terminating minutes of use based upon the customer's commitment to purchase switched access for a specified period ranging from one to five years. The growth plan would provide discounts based upon the customer's commitment to a particular percentage of usage growth over previous usage.

GTE requests a waiver to offer discounts to the local switching, information surcharge and terminating carrier common line rate elements.

Interested parties are to file comments on this petition by **September 3, 1993**, and reply comments by **September 20, 1993**, with the Secretary, FCC 1919 M Street, N.W., Washington, D.C. 20554. A copy should also be sent to Peggy Reitzel, Common Carrier Bureau, FCC, Room 544, 1919 M Street, N.W., Washington, D.C. 20554, and to the Commission's contractor for public service records duplication: ITS, Inc., 2100 M Street, N.W., Suite 140, Washington, D.C. 20037. Copies of the petition can be obtained from ITS, Inc. at (202) 857-3800.

We will treat this proceeding as non-restricted for purposes of the Commission's *ex parte* rules. *See generally*, 47 C.F.R. §§1.1200-1.1216. For further information contact Peggy Reitzel, Policy and Program Planning Division of the Commission Carrier Bureau, at (202) 632-1300.

FEDERAL COMMUNICATIONS COMMISSION

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

Amendment to Part 63
of the Commission's Rules

ORDER

Adopted: April 23, 1993; Released: August 17, 1993

By the Commission:

1. The Commission hereby amends Part 63 of our rules, 47 C.F.R. Part 63, to increase the monetary and circuit limitations which restrict the number of applications that may be processed under the "informal" processing procedures set forth in Section 63.03(a) and by revising § 63.01(o) of our rules to reflect that applicants for international service will not be required to file proposed tariff charges and regulations. This Order is a result of our continuing efforts to identify and eliminate unnecessary and burdensome regulations. Based on our review, we have identified the aforementioned subsections of Part 63 of the Commission's Rules as regulations which require amendment in order to avoid burdensome regulation and to promote the goal of regulatory efficiency. In addition, the amendments to § 63.03(a)(5) are also necessary in light of Commission decisions which have rendered certain portions obsolete.[1]

I. BACKGROUND

2. Section 214 of the Communications Act of 1934, as amended, provides that no carrier shall undertake the construction of a new line or extension of any line, or shall acquire or operate any line, or extension thereof without first having obtained a certificate from the Commission that the present or future public convenience and necessity require the construction and/or operation of such extended line. Part 63 of our rules sets forth specific information which must be included in a Section 214 application to extend lines by a common carrier. Section 63.01 of our rules sets forth information which must be contained in a formal Section 214 application. Formal applications are placed on the Commission's public notice for a thirty day period and are subject to a petition to deny or other responsive pleadings within the 30 day period. Moreover, formal applications result in a written Commission order. Among the information required to be included in a Section 214 application filed pursuant to Section 63.01 are proposed tariff charges and regulations.[2]

3. Section 63.03 of the Commission's rules sets forth provisions for filing applications pursuant to Section 214 of the Communications Act, as amended, to supplement existing facilities. Applications filed pursuant to § 63.03(a) are often referred to as "informal" applications and are deemed to be granted by the Commission on the 21st day after the public notice date unless the Commission notifies the applicant to the contrary. The clear purpose of the rule is to streamline the process for carriers seeking authority to acquire additional facilities for service to points previously authorized and to reduce the regulatory burden on the Commission. Section 63.03(a)(5) excludes from these "informal" procedures applications which request in excess of 16 international voice grade circuits for voice carriers or 6 international voice grade circuits for record carriers. Section 63.03(a)(6) excludes those applications involving domestic channels where the construction or acquisition cost exceeds $1,000,000 or where the annual rental exceeds $200,000.

II. DISCUSSION

4. In this Order we amend § 63.03(a)(5) in two respects; 1) the distinction between "voice" and "record" carriers is eliminated, and 2) the number of international circuits that may be processed under the "informal" procedures of § 63.03 is increased from 16 voice grade circuits to 60 64-kilobit per second (Kbps) circuits. There is no longer any basis for the dichotomy between voice and record carriers. The dichotomy, first set forth in the *TAT-4* decision,[3] was established to protect the international record carriers (IRCs) from the threat of competition from AT&T in the provision of alternate voice-record service, which in 1964 was a new service involving elements of both voice and record services.[4] In light of AT&T's huge resources relative to the IRCs, the Commission found that permitting AT&T to provide alternate voice-record service would threaten the viability of the IRCs. The Commission further determined that all future alternate voice-record service would be provided by the IRCs.

5. In 1982, the Commission found that there had been substantial growth in both the voice and record markets and that the IRCs were no longer the struggling enterprises that needed to be protected from competition.[5] Thus, the Commission determined that the removal of all restrictions on the service offerings of carriers would not irreparably harm either AT&T or the IRCs.[6] Although the "voice" and "record" distinctions have not been viable since 1982, these terms were not deleted from § 63.03(a)(5). We therefore amend § 63.03(a)(5) by deleting the references to "voice" and "record" carriers and instead specify a total number of circuits applicable to all carriers.

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[1] During our review of Part 63, we discovered that certain language had been inadvertently omitted from the current version of 47 C.F.R. 63.03(d). That section is revised herein to include the omitted language.

[2] § 63.01(o).

[3] American Telephone & Telegraph Co., 37 FCC 1151 (1964).

[4] At that time the IRCs provided almost 100% of overseas telegraph services, while AT&T stated that it had no interest in providing such services.

[5] Overseas Communications Services, 92 FCC 2d 641 (1982).

[6] *Id.*

6. Amendment of § 63.03(a)(5) to specify a total number of circuits applicable to all carriers is also justified in light of the Commission's *International Competitive Carrier* decision.[7] In that decision, we established, *inter alia*, streamlined procedures for non-dominant carriers with respect to acquiring additional facilities to countries that they are already authorized to serve for the same category of service. Instead of filing a Section 214 application for the additional circuits, non-dominant carriers need only reflect the circuit additions in a semi-annual circuit addition report. As a result of these changes, § 63.03(a)(5) has virtually no applicability to non-dominant carriers and remains viable only for dominant carriers such as AT&T.

7. We also determine that raising the current number of international circuits specified in § 63.03(a)(5) from 16 voice grade circuits to 60 64-kbps circuits will make the special provisions of § 63.03(a) more useful to AT&T and other dominant carriers while reducing the regulatory burdens on both the carriers and the Commission. The circuit limits specified in § 63.03(a)(5) have been raised in the past based on the need to reduce burdens on both carriers and the Commission. For example, in 1984 we raised the number of circuits from 7 to 16 circuits for voice carriers after determining that almost 50% more applications could have been filed under § 63.03 if the circuit limitation were raised from 7 to 16 circuits. While we have not calculated the precise percentage of additional applications that could be handled under § 63.03 if the number is raised from 16 to 60 64-kbps circuits, based on our experience we believe that a significant number of additional applications would qualify for "informal" treatment under § 63.03. In addition, increasing the current circuit limitations to 60 64-kbps circuits would remove the need for any further amendments in the near future. Moreover, a high degree of scrutiny of applications that propose increases of 60 64-kbps circuits or less is unnecessary because: 1) carriers will merely be adding circuits to locations for which the Commission has already made a public interest determination pursuant to Section 214 of the Communications Act, as amended; 2) reduced circuit costs coupled with increased demand for service make it feasible for carriers to acquire a greater number of circuits; and 3) use of these circuits will be limited to the provision of services previously authorized.

8. We also increase the monetary limitations for domestic circuits set forth in § 63.03(a)(6) from $1,000,000 to $2,000,000 for construction or acquisition costs and from $200,000 to $500,000 for annual rental costs. The history of § 63.03(a)(6) demonstrates that it has been amended over time to promote the same goals that are the subject of this Order. In 1953, we amended § 63.03(a)(6) to cover applications involving construction costs not in excess of $250,000 or annual rental costs not in excess of $10,000.[8] The previous limits permitted applications to be processed under §63.03(a)(6) if construction costs did not exceed $50,000 or annual rental costs did not exceed $5,000. We found that the $250,000 limit was desirable in light of the "present and continuing high demand for service and the increasing magnitude of general construction programs".[9]

9. In 1976, § 63.03(a)(6) was further amended to include applications involving construction costs not in excess of $500,000 and annual rental costs not in excess of $100,000.[10] A In March 1984, these limitations were increased to $1,000,000 and $200,000, respectively.[11] Thus, we have consistently recognized and responded to the need to amend this section of our rules to account for present day realities such as increases in inflation, particularly in construction costs, and the increasing regulatory burden placed on the Commission as the number of applications increased. We conclude that those same factors also justify the increases adopted herein and the amendments to the Commission's rules.

10. We also find that the public interest requires revision of Section 63.01(o) of our rules to reflect that the inclusion of a sample tariff with an international Section 214 application is unnecessary. With respect to international service, the need for a sample tariff must be viewed in the contexts in which a Section 214 application may be filed. In those instances where an applicant for international service is requesting to serve a foreign location for the first time, the applicant typically will not have all of the information necessary to formulate proposed tariff charges and regulations since, under existing Commission policy, an applicant need not have an operating agreement at the time a Section 214 application is filed.[12] The terms and conditions of an operating agreement, particularly with respect to accounting rates, have a bearing on proposed charges and regulations. After the applicant receives a Section 214 authorization and before it implements service, it must file a tariff pursuant to Part 61 of the Commission's Rules, 47 C.F.R. Part 61, which will be subject to review under the Communications Act. In those instances where an applicant for international service files a Section 214 application to supplement existing facilities to a country it is already authorized to serve, a sample tariff is unnecessary because the applicant will already have a tariff in effect. Accordingly, we conclude that the public interest is not served by the general requirement that a sample tariff be filed in connection with an international Section 214 application.

11. In light of the nature of the changes being adopted, we believe that they can be implemented immediately, resulting in less burdensome procedures for both the carriers and the Commission without adversely affecting the public interest or our continuing regulatory responsibility.[13]

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[7] International Competitive Carrier Policies, 102 FCC 2d 812 (1985); *recon. denied*, 60 RR 2d 1435 (1986); *modified*, Regulation of International Common Carrier Services, CC Docket No. 91-360, FCC 92-463 (released November 5, 1992).

[8] Amendment to Part 63 of the Commission's Rules, 18 FR 8902 (1953).

[9] *Id.*

[10] Amendment to Part 63 of the Commission's Rules, Report and Order, 41 FR 20661 (1976).

[11] Amendment to Part 63 of the Commission's Rules, Report and Order, 49 FR 22818 (1984).

[12] The Commission has recognized that foreign correspondents may be reluctant to enter into negotiations if the carrier has not received a Section 214 authorization from the Commission. *See* International Relay, Inc., 77 FCC 2d 819, 827 (1980).

[13] Because these rule amendments effectuate relatively minor changes in our rules and are unlikely to generate comment or opposition from the public, we find for good cause that affording prior public notice and an opportunity for comment is unnecessary. *See* 5 U.S.C. §553(b)(B).

12. Accordingly, IT IS ORDERED, pursuant to Sections 4(i), 4(j), and 214 of the Communications Act, 47 U.S.C 154(i), 154(j) and 214 that the rules contained in Appendix A below are hereby adopted effective ninety (90) days after publication in the Federal Register.

FEDERAL COMMUNICATIONS COMMISSION

William F. Caton
Acting Secretary

APPENDIX A

Rule Changes

Part 63 of Chapter 1 of Title 47 of the Code of Federal Regulations is amended as follows:

PART 63--EXTENSION OF LINES AND DISCONTINUANCE, REDUCTION, OUTAGE AND IMPAIRMENT OF SERVICE BY COMMON CARRIERS; AND GRANTS OF RECOGNIZED PRIVATE OPERATING AGENCY STATUS

1. The authority citation for Part 63 continues to read as follows:

AUTHORITY: Sections 1, 4(i), 4(j), 201-205, 218 and 403 of the Communications Act of 1934, as amended, 47 U.S.C. secs. 151, 154(i), 154(j), 201-205, 218 and 403, unless otherwise noted.

2. Section 63.01 is amended by revising paragraph (o) to read as follows:

§ 63.01 Contents of applications.

* * * * *

(o) Proposed tariff charges and regulations for domestic applications;

* * * * *

3. Section 63.03 is amended by revising paragraphs (a)(5), (a)(6) and (d) to read as follows:

§ 63.03 Special provisions relating to small projects for supplementing of facilities.

(a)* * *

(5) International channels exceeding 60 64-kilobit per second circuits; or

(6) Domestic channels where the construction or acquisition cost exceeds $2,000,000 or where the annual rental exceeds $500,000.

* * * * *

(d) Such supplementing of facilities shall be deemed to have been authorized by the Commission effective as of the 21st day following the date the application appears on public notice unless on or before the 21st day the Commission shall notify the applicant to the contrary. Where supplemental facilities are authorized under this section, they shall be considered subject to the same terms and conditions, if any, that the Commission has imposed upon a prior authorization which is being supplemented.

* * * * *

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

AMERICAN MESSAGE CENTERS,
Complainant,

v. File No. E-91-116

SPRINT COMMUNICATIONS COMPANY L.P.,
Defendant.

MEMORANDUM OPINION AND ORDER

Adopted: August 6, 1993; Released: August 17, 1993

By the Commission:

I. INTRODUCTION

1. We have before us a complaint filed by American Message Centers (AMC) against Sprint Communications Company L.P. (Sprint) in which AMC alleges that Sprint violated Sections 201(b) and 202(a) of the Communications Act of 1934, as amended,[1] by imposing charges for unauthorized long distance calls that were placed through an AMC facility and ultimately carried on Sprint's interstate network. AMC has also filed a "Request for the Imposition of Sanctions and the Issuance of a Notice of Apparent Liability" (Request for Sanctions) alleging that Sprint made false or misleading statements to the Commission and failed to adhere to Commission rules pertaining to discovery and formal complaint pleading requirements. For the reasons discussed below, we deny AMC's complaint and its request for sanctions.[2]

II. BACKGROUND

2. AMC provides telephone answering services to retail customers by utilizing direct inward dial (DID) incoming lines linked to its central location in Sherman Oaks, California. A call to any of AMC's local numbers in California and Nevada is automatically forwarded via incoming WATS lines to AMC's Sherman Oaks location. Beginning in 1989, AMC subscribed to resold long distance telecommunications services, including WATS lines, that were provided by Telecom Management Systems, Inc. (TMS). TMS obtained these services from Pacific Bell and Sprint on a volume discount basis. The incoming WATS lines terminated on AMC's premises at what AMC refers to as its "COBOT Reception Center."[3] AMC alleges that it was assured by the manufacturer that the COBOT Reception Center equipment could not be used to route an incoming call to an outgoing line.[4]

3. In early April 1991, a Sprint representative informed AMC that there had been two incoming calls of unusual duration on AMC's incoming WATS lines.[5] Later that month, AMC determined that its monthly invoice from TMS contained charges for unauthorized outgoing international calls. AMC contacted TMS representatives who investigated and determined that unauthorized calls originating in New York City were being routed through AMC's COBOT Reception Center. AMC subsequently disconnected this equipment on or about April 17, 1993. In April, May, and June 1991, AMC received TMS invoices that contained $173,225.51 in charges attributable to allegedly fraudulent calls.[6]

4. In June 1991, TMS notified AMC that Sprint was holding TMS responsible for the charges associated with the allegedly fraudulent calls pursuant to its Tariff F.C.C. Nos. 1 and 2. TMS further advised AMC that it would, in turn, hold AMC responsible for the charges. AMC and TMS then entered into negotiations concerning payment of the charges. When they were unable to reach any agreement, TMS filed suit against AMC in the Superior Court of California, County of Los Angeles, to collect the unpaid charges.[7] On August 5, 1991, AMC's counsel contacted Sprint and requested that a meeting be held to discuss a settlement of the disputed charges. On August 9, 1991, Sprint rejected AMC's request, stating that it was requiring payment from TMS for the disputed services regardless of whether TMS collected for those services from other parties.[8] Sprint further advised AMC's counsel that any "arrangement" between TMS and AMC regarding payment of the disputed charges was not the business of Sprint. On August 27, 1991, AMC requested that TMS, as Sprint's customer, give written notice to Sprint that it disputed the charges at issue, as required by Sprint's tariff.[9] TMS de-

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[1] 47 U.S.C. §§ 201(b), 202(a).

[2] AMC also filed a motion to compel responses to its first set of interrogatories served on Sprint on January 20, 1992. Sprint has opposed the motion to compel. AMC subsequently filed a motion requesting the Commission to issue a final appealable order resolving its complaint or, in the alternative, an order requiring further discovery on the issues raised in the complaint. *See* Motion for Final Order or For Discovery Rulings, filed December 17, 1992. In light of our action denying AMC's motion to compel, *see infra*, para. 14, and its underlying complaint, AMC's alternative request for further discovery is now moot.

[3] AMC describes the COBOT Reception Center as "an automated attendant or automated reception center that routes calls within the company." Complaint at Tab. 1, p. 2.

[4] Complaint at 8.

[5] *Id.* According to Sprint, it contacted AMC only after being unable to reach Sprint's actual customer, TMS. Answer at 7.

[6] Complaint at 11. Of this total amount, the underlying Sprint charges to TMS were approximately $145,000, according to AMC; the remaining amount reflected charges levied by TMS for its services. In addition, the August 1991 invoice that AMC received from TMS included $647.24 in charges attributable to allegedly fraudulent calls. *Id.* at 14.

[7] *See* Telecom Management Systems, Inc. v. American Message Centers, No. BC033601 (L.A. Super. Ct., filed July 1, 1991).

[8] Complaint at Exhibit 7 (letter from George S. Duesdieker, Sprint, to Russell D. Lukas, counsel for AMC, *et al.*).

[9] *Id.* at 14.

clined to do so.[10] AMC subsequently filed complaints with the Commission charging TMS and Sprint with violations of Sections 201(b) and 202(a) of the Act in connection with their treatment of the disputed charges. TMS and AMC later reached a settlement of their dispute, and the Bureau dismissed AMC's complaint against TMS at the joint request of AMC and TMS.[11] The crux of AMC's complaint against Sprint is its claim that Sprint's demand that TMS pay all charges associated with the fraudulent calls placed through AMC's COBOT Reception Center is not authorized by Sprint's tariffs and is unjust and unreasonable under Section 201(b) of the Act and unreasonably discriminatory under Section 202(a). We address the parties' specific contentions below.

III. DISCUSSION

A. AMC's standing to challenge Sprint's charges to TMS.

1. Contentions of the parties.

5. In its first two affirmative defenses, Sprint argues that AMC subscribed to TMS, not Sprint, services and that AMC's dispute over the unauthorized calls is therefore with TMS, not Sprint.[12] Sprint further notes that TMS itself has not denied that it received services from Sprint, has not challenged the accuracy of bills for those services, and has not questioned the applicability or validity of the relevant Sprint tariff provisions.[13] AMC replies that it "incurred damages that were proximately caused by Sprint's enforcement of its unlawfully vague tariff provisions against its subscriber," TMS.[14] AMC characterizes its payment of $78,999.40 to settle a lawsuit brought by TMS to be "a direct result of Sprint's actions."[15] According to AMC, "[i]f Sprint had not unlawfully insisted on payment [from TMS], AMC would not have been damaged."[16] AMC also maintains that Section 208 of our rules "entitled AMC to bring this action even if it was not directly injured by Sprint's unlawful conduct."[17]

2. Discussion.

6. We reject Sprint's threshold claim that the complaint should be dismissed because AMC was not the customer of Sprint at the time the alleged toll fraud occurred. The fact that AMC was not a customer of Sprint does not negate AMC's standing to file this complaint challenging the lawfulness of Sprint's common carrier practices, even in the absence of direct or indirect injury.[18] AMC has, as would any member of the public, a valid interest in ascertaining through this Section 208 proceeding whether Sprint is providing service to the public under unlawful tariff provisions or is otherwise engaging in unjust, unreasonable, or discriminatory practices in providing common carrier services.

B. Sprint's Tariff Provisions.

1. Contentions of the parties.

7. We next address AMC's challenge to the tariff provision upon which Sprint relies in assigning TMS liability for charges associated with the allegedly fraudulent calls. Identical language in Section 3.11.4 of Sprint Tariff F.C.C. Nos. 1 and 2 provides in pertinent part: "Subscriber shall be responsible for the payment of all charges for service provided under this Tariff...." AMC maintains that this language does not provide a "clear and explicit" explanation that Sprint will hold a subscriber responsible for charges resulting from remote access toll fraud.[19] This deficiency, according to AMC, violates Sections 61.2 and 61.54(j) of the Commission's rules, which require tariff provisions to be clear, explicit, and definite[20] AMC also contends that because fraudulent calls are unlawful, they do not constitute services provided under tariff and, hence, are not covered by the general payment obligation of the tariffs.[21]

8. In answer to the complaint, Sprint denies that its tariff provisions are vague and ambiguous and maintains that the provisions clearly obligate customers to pay all charges for services that they receive from Sprint, including those obtained through the unauthorized use of a customer's facilities.[22] Sprint maintains that even if TMS had incurred the disputed charges as a result of the unauthorized use of its telephone system,[23] it would nonetheless be required under the terms of Sprint's tariffs to pay for the services obtained.[24] Sprint argues that AMC has presented no credible evidence to show that Sprint does not consistently

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[10] *Id.*

[11] *See* American Message Centers v. Telecom Management Service, Inc., 7 FCC Rcd 2250 (Com. Car. Bur. Enf. Div. 1992).

[12] Answer at 20.

[13] *Id.* at 20-21.

[14] Reply at 3.

[15] *Id.* at 4.

[16] *Id.*

[17] *Id.*

[18] Section 208 of the Communications Act, 47 C.F.R. § 208, provides, in pertinent part:

> *Any person* ... complaining of anything done or omitted to be done by any common carrier subject to this Act, in contravention of the provisions thereof, may apply to said Commission by petition ... whereupon a statement of the complaint thus made shall be forwarded by the Commission to such common carrier, who shall be called upon to satisfy the complaint or to answer the same in writing within a reasonable time to be specified by the Commission.... *No complaint shall at any time be dismissed because of the absence of direct damage to the complainant.* [emphasis added]

See also, Comark Cable Fund III, 100 FCC 2d 1244, *recon. denied,* 103 FCC 2d 600, 604-605 (1987), *remanded sub nom. Northwestern Indiana Telephone Co. v. FCC,* 824 F.2d 1205 (D.C. Cir. 1987), *clarified on remand,* 3 FCC Rcd 3096 (1988), *pet. for rev. denied,* 872 F.2d 465 (D.C. Cir. 1989), *rehearing denied* (D.C. Cir. June 27, 1989), *cert denied,* U.S. (1990), 110 S. Ct. 757.

[19] Complaint at 27.

[20] *Id.* at 28 (citing 47 C.F.R. §§ 61.2 and 61.54(j)).

[21] *Id.* at 28; Reply at 8.

[22] Answer at 21-22.

[23] Sprint does not dispute AMC's claim that the calls were placed through the unauthorized use of AMC's equipment.

[24] Answer at 21-22 (citing Chartways Technologies, Inc. v. AT&T Communications, 6 FCC Rcd 2952, 2954 (Com. Car. Bur. 1991), *appl. for rev. pending).*

apply its tariffs to hold subscribers liable for unauthorized or fraudulent calls or that Sprint was negligent in any way with respect to the unauthorized calls.[25]

9. In reply, AMC contends that Sprint's reliance on the Bureau's decision in *Chartways* is misplaced. According to AMC, the Bureau "held only that AT&T's tariffs were not vague, specifically because *exceptions* to payment obligations were explicitly stated in the tariffs."[26] AMC also quotes language from *Chartways* to support its claim that "the Commission must rule that US Sprint's tariffs are unreasonably vague because they do not specify customer liability for unauthorized use."[27]

2. Discussion.

10. We are not persuaded by AMC's claims that the relevant Sprint tariff provisions violate Sections 201(b) and 203(c) of the Act or Sections 61.2 and 61.54(j) of our rules because they do not specify that the customer is responsible for unauthorized use of services provided under the tariffs. Section 61.2 states that "all tariff publications must contain clear and explicit explanatory statements regarding rates and regulations." Section 61.54(j) provides that the:

> general rules..., regulations, exceptions, and conditions which govern the tariff must be stated clearly and definitely. All general rules, regulations, exceptions or conditions which in any way affect the rates named in the tariff must be specified.

The general payment obligation in Sprint Tariff F.C.C. Nos. 1 and 2 contains the explicit statement that the "Subscriber shall be responsible for the payment of all charges for service provided under this Tariff...." As AMC acknowledges,[28] the tariff provisions contain no exception to this payment obligation. In the absence of such an exception, the clear meaning of the relevant tariff provisions is that the subscriber's obligation includes liability for unauthorized usage of services provided under tariff.[29] Moreover, we disagree with AMC's contention that unauthorized calls do not utilize services provided under tariff. Such calls, though unlawfully placed, are possible because a subscriber has ordered and is being provided service under a carrier's tariff.[30] Therefore, we find that the general payment obligation quoted above applies to unauthorized or otherwise fraudulently placed calls.

C. AMC's Section 202(a) Claim.

1. Contentions of the parties.

11. AMC contends that Sprint engaged in unlawful price discrimination by insisting that TMS pay Sprint in full for the toll fraud charges while relieving other subscribers from liability.[31] Sprint counters that AMC has provided no credible evidence to show that Sprint does not consistently apply its tariffs to hold its subscribers liable for unauthorized usage.[32] Sprint further argues that its customer, TMS, did not experience any remote access toll fraud and did not seek to be relieved of any charges. Sprint contends, therefore, that even had it relieved other customers of charges resulting from such type of fraud, which it states it has a policy of not doing, Sprint has not violated Section 202(a) by refusing to relieve TMS of the charges in question here.[33]

2. Discussion.

12. We are not persuaded that AMC has alleged facts sufficient to establish a claim of unreasonable discrimination under Section 202(a) of the Communications Act. The crux of AMC's discrimination claim is its allegation that Sprint has a policy of adjusting toll fraud charges incurred by non-resale customers while insisting that resale customers such as TMS pay the full amount of such charges. We find it significant that Sprint's customer for the services, TMS, did not dispute or otherwise challenge Sprint's actions in assessing the charges for the fraudulent calls. Indeed, the record shows that TMS refused to do so when requested by AMC.[34] Since this is not a case where the customer requested or even challenged any particular treatment or action by Sprint, we find that AMC has failed to state a cause of action under Section 202(a).

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[25] *Id.* at 24-25.

[26] Reply at 6 (emphasis in original).

[27] *Id.* at 8.

[28] Reply at 8 ("Sprint's tariffs provide absolutely no exception to the general payment obligations of the subscribers").

[29] Contrary to AMC's argument, we find no support in *Chartways* for the proposition that such a tariff provision must always contain specific exceptions to general payment obligations in order to be lawful under Sections 201(b) and 203 of the Act and the Commission's rules. Moreover, AMC's use of language from *Chartways* to support this proposition appears to contradict the conclusion actually reached by the Bureau. *See Chartways*, 6 FCC Rcd at 2954 ("[the Bureau was] *unpersuaded* ... that the tariffs are unreasonably vague because they do not specify customer liability for unauthorized use... .") (emphasis added).

[30] AMC has not alleged that Sprint was negligent or otherwise acted in an unreasonable manner in connection with the transmission of the disputed calls that would relieve TMS of liability for the toll fraud charges.

[31] Complaint at 31-32. According to AMC, "[i]ndustry sources have advised [it] that US Sprint has reached settlement involving toll fraud disputes." *Id.* at n.79. AMC attempts to bolster its discrimination claims by arguing that the facts "establish" that Sprint collects less than its tariff rates from its non-resale customers when they are victimized by toll fraud but refused to even discuss settlement of charges incurred by TMS, one of its resale customers. Motion for Final Order at 7-8.

[32] Answer at 23.

[33] Motion to Dismiss at 6.

[34] Complaint at p. 14. Further, we note that AMC has settled both the California law suit brought against it by TMS and its own Section 208 complaint against TMS. This apparently voluntary settlement ended AMC's dispute with the only entity from which it had obtained service and to which it had any potential liability for charges resulting from the unauthorized calls. We find no evidence in the record indicating that Sprint had any involvement, either direct or indirect, in the dealings between AMC and TMS.

D. AMC's Motion to Compel Responses to Interrogatories

1. Contentions of the Parties

13. On January 20, 1992, AMC propounded interrogatories to Sprint seeking information regarding Sprint's handling of the calls and charges at issue in the complaint as well as Sprint's general practices, policies and procedures in handling toll fraud matters. AMC also sought information regarding the amounts Sprint had billed and collected from its customers for services provided as a result of toll fraud for the years 1988 through 1991. On February 20, 1992, Sprint filed a response in which it generally objected to the interrogatories on the grounds that AMC had not opposed Sprint's motion to dismiss the complaint for failure to state a claim. Sprint argued that in any event, the interrogatories were irrelevant, immaterial and burdensome.[35] AMC filed a motion to compel on March 6, 1992, arguing, *inter alia*, that it had properly stated a cause of action in its complaint and that the requested information was relevant and necessary to a determination by the Commission. AMC also asserted that Sprint had failed to act in good faith in filing what AMC describes as a conclusory statement objecting to the interrogatories.

2. Discussion

14. We note at the outset that none of the interrogatories propounded by AMC seek information that would be relevant or helpful to our consideration of the issue that we have determined to be properly before us, that is, whether the tariff provisions under which Sprint held TMS liable for the allegedly fraudulent calls are lawful under Sections 201(b) and 203(c) of the Communications Act and Sections 61.2 and 61.54(j) of the Commission's rules. The interrogatories go essentially to AMC's claim that Sprint's handling and discussion of the disputed toll fraud charges with TMS in comparison with its treatment of other Sprint customers constituted unreasonable discrimination within the meaning of Section 202(a) of the Act. In light of our determination that the specific allegations presented by AMC in this proceeding are insufficient to state a cause of action under Section 202(a), we deny AMC's motion to compel.

E. AMC's Request for Sanctions.

1. Contentions of the parties.

15. AMC requests the Commission to impose sanctions on Sprint for what it describes as willful violations of Sections 1.17, 1.720 and 1.729 of the Commission's rules.[36] AMC's Section 1.17 claims center around Sprint's response to a letter filed by counsel for AMC urging the Commission to grant AMC's complaint against Sprint so that Sprint would not profit from toll fraud.[37] In a responsive letter, counsel for Sprint represented that "Sprint has never received any money from TMS for such services" and "likely will never receive any money from TMS" because TMS had filed for bankruptcy.[38] AMC contends that Sprint's statements were false and misleading because Sprint had in fact already received payments from TMS for the toll fraud charges. AMC submitted copies of checks from AMC to TMS that, AMC claims, provided funds for TMS to make payments to Sprint for outstanding charges, including those attributable to the fraudulent calls at issue here. AMC contends that without those disclosures, Sprint's "flat statement that [it] got no money from the toll fraud could have influenced the Commission to rule against AMC on the issue of damages."[39] AMC argues that Sprint's false and misleading statements were in clear violation of Section 1.17 of the Commission's rules,[40] which prohibits any Commission licensee from making "any misrepresentation or willful material omission" in any written statement submitted to the Commission.[41]

16. AMC's allegations of Section 1.720 and 1.729 violations stem from what AMC characterizes as Sprint's failure to proffer any affidavit or declaration to support its statements of fact[42] and its failure to respond in good faith to AMC's discovery requests.[43] Specifically, AMC argues that Sprint violated Section 1.720(c) by making "a myriad" of unsupported factual representations, none of which are susceptible to official notice by the Commission. Moreover, AMC contends, Sprint violated Section 1.720(g) by refusing "to maintain 'the continuing accuracy and completeness of all information' it furnished in this case."[44] As for its discovery claims, AMC maintains that Sprint's refusal to answer the interrogatories propounded by AMC violates the clear requirements of Section 1.729(b). AMC argues that the evidence supports a finding that Sprint's violations were egregious, intentional and repeated. Therefore, AMC contends, the Commission should assess the maximum monetary forfeiture for the transgressions.[45]

17. Sprint filed an opposition urging summary dismissal of AMC's Request for Sanctions. Sprint argues that AMC's request represents nothing more than an attempt by AMC to use the Commission's processes to obtain by threat and intimidation the money it purportedly paid TMS for calls placed through AMC's equipment.[46] Sprint argues that the

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[35] Opposition to Motion to Compel at 1.

[36] *See* 47 C.F.R. §§ 1.17 (Truthful written statements and responses to Commission inquiries and correspondence), 1.720 (Formal Complaints, General pleading requirements), and 1.729 (Interrogatories to parties).

[37] AMC Reply to Opposition To Motion To Compel at 7.

[38] Letter of Michael B. Fingerhut, Sprint, to the Commission, dated September 3, 1992.

[39] *Id.* at 18.

[40] 47 C.F.R. § 1.17.

[41] We note that AMC has filed an application for review of ruling by the Chief, Common Carrier Bureau which denied its petition to deny the merger of Centel Corporation and Sprint. *See* Applications of Centel Corporation and Sprint Corporation For Consent to Transfer Control of Authorizations, 8 FCC Rcd 1829 (Com. Car. Bur. 1993), *application for review pending*. AMC had petitioned the Commission to designate a hearing to determine whether Sprint possesses the requisite qualifications to be a Commission licensee in light of the alleged misrepresentations made in AMC's Section 208 complaint proceeding. The Bureau found that AMC's allegations failed to raise a substantial and material question of fact regarding Sprint's qualifications to be a Commission licensee.

[42] Request for Sanctions at 27-28.

[43] *Id.* at 29-30.

[44] *Id.* AMC contends, in effect, that Sprint had ample opportunity to correct its false and misleading statements but failed to do so.

[45] *Id.* at 30.

[46] Opposition to Motion for Sanctions at 1-3.

statements cited by AMC as a basis for sanctions referred only to the charges and services at issue in this proceeding. Sprint claims that these statements were intended to convey the idea that any payments it had received were not necessarily applied to the charges for the fraudulent calls at issue here.[47] Sprint argues that it is under no obligation, legal or otherwise, to determine the source of funds and apply them to a particular part of a customer's indebtedness. The promissory note on which TMS made payments was for substantially more than the alleged toll fraud charges, and these payments, according to Sprint, can be attributed to any of the outstanding TMS charges.[48]

18. Sprint claims that in any case, the letter in question was intended to inform the Commission that TMS had filed for bankruptcy and to respond to AMC's claim that Sprint was profiting from the crime of toll fraud. Sprint notes that even if the TMS payments were applied proportionately to all the unpaid charges covered by the promissory note, including those attributable to toll fraud, over two-thirds of the note still remained unpaid at the time of the bankruptcy filing. Sprint states that because of the unsecured nature of the TMS debt, Sprint is likely to lose a significant amount of money.

19. As for the alleged violation of Section 1.720 of the rules, Sprint argues that AMC's claims are totally without merit because it has supplied all relevant documentation or relied upon the documentation and statements supplied by AMC itself to support its positions.[49] Sprint further contends that AMC's claim that it violated Section 1.729 of the rules is equally without merit because it simply availed itself of the right under the Commission's rules to object to any interrogatory propounded by the opposing party.[50] Sprint argues that although AMC filed a motion to compel, it did not demonstrate "'the relevance and necessity for the requested information'" as required under Section 1.729(c).[51]

2. Discussion

20. We have reviewed the evidence and arguments presented by the parties and are not persuaded that Sprint's statements were misleading or otherwise sanctionable as AMC contends. Nor do we believe that AMC's allegations raise substantial and material questions of fact suggesting misrepresentation or lack of candor that would call into question, in light of Sprint's explanation, Sprint's qualifications to be a Commission licensee. Our review of the statements and the context in which they were made revealed no support for AMC's claim that they were knowingly false or misleading when made. The principal evidence relied upon by AMC are copies of cancelled checks which it claims it gave to TMS for the express purpose of making payments to Sprint for the outstanding toll fraud charges. AMC also submitted a declaration by Deborah Ward, President of TMS, in which Ms. Ward states that the checks were cashed by TMS "and used to purchase cashier checks payable to Sprint." According to AMC this evidence clearly shows that Sprint had received approximately $80,000 from TMS that were directly traceable to AMC's payments to TMS for the toll fraud charges.[52] Sprint has acknowledged that it had received payment from TMS at the time it filed its statements in the complaint proceeding but maintains that the statements were intended to convey the idea that the payments received from TMS were not necessarily for the disputed charges. Sprint points out that TMS submitted the amounts without specifically designating them as payments for any of the toll fraud charges.[53] Sprint explains further that the amount owed by TMS was substantially more than the charges at issue in AMC's complaint and argues that it was under no obligation to determine the source of the payments and apply them to any particular part of the debt owed by TMS. In the absence of some indication in the record that TMS specifically earmarked its payments to Sprint as payments for the calls disputed in AMC's complaint, we conclude that AMC has failed to rebut Sprint's explanation.

21. Moreover, we find that neither AMC's allegations of misrepresentaion nor Sprint's responsive statements relate to a matter of decisional significance in this complaint proceeding. None of the disputed statements are relevant to our determination of the lawfulness of Sprint's tariff provisions. Further, we have determined that AMC has failed to allege facts sufficient to establish a claim of unreasonable discrimination within the meaning of Section 202(a) of the Act. Accordingly, we deny AMC's Request for Sanctions based on alleged violations of Sections 1.17 and 1.720 of the rules.

22. Finally, AMC has provided no legal support or rationale for its claim that Sprint violated Section 1.729(b) of the rules by responding to AMC's interrogatories in the manner that it did. In any event, we have denied AMC's motion to compel responses to the interrogatories on the grounds that the information requested is not relevant to our determination of the issues raised in AMC's complaint.

IV. CONCLUSION

23. For the reasons discussed above, we find that AMC has failed to establish that tariff provisions at issue are unlawfully vague or ambiguous within the meaning of Sections 201(b) and 203(c) of the Communications Act or Sections 61.2 and 61.54(j) of our rules. We also conclude that AMC has failed to allege facts sufficient to establish a claim of unreasonable discrimination under Section 202(a) of the Act. Finally, we find that the record presented in this matter does not warrant the imposition of sanctions requested by AMC.

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[47] Sprint Opposition to Request for Sanctions at 16.

[48] *Id.* at 4-5. Sprint points out that the first payment by TMS on the promissory note was well before any AMC payment to TMS, while the third TMS payment to Sprint was well before the final AMC payment to TMS. Sprint adds that the amount of the second TMS payment to Sprint was for less than any of the AMC payments to TMS. *Id.* at 6-7.

[49] *Id.* at 18-20.

[50] *Id.* at 20.

[51] *Id.* at 20.

[52] Request for Sanctions at 7-12 and Exhibit 1.

[53] Opposition at 8.

V. ORDERING CLAUSES

24. Accordingly, IT IS ORDERED, pursuant to Sections 4(i), 4(j), 201, and 206-208 of the Communications Act of 1934, as amended, 47 U.S.C. §§ 154(i), §154(j), 201, and 206-208, that the above-captioned complaint filed by AMC IS DENIED.

25. IT IS FURTHER ORDERED that the Motion to Dismiss filed by Sprint IS DENIED.

26. IT IS FURTHER ORDERED that AMC's Motions to Compel Answers to Interrogatories IS DENIED.

27. IT IS FURTHER ORDERED that AMC's Motion for Final Order or For Discovery Rulings, IS GRANTED to the extent indicated herein and otherwise IS DISMISSED as moot.

28. IT IS FURTHER ORDERED that the Motion for Sanctions filed by AMC IS DENIED.

FEDERAL COMMUNICATIONS COMMISSION

William F. Caton
Acting Secretary

Before the
Federal Communications Commission
Washington, D.C. 20554

ET Docket No. 93-62

In the Matter of

Guidelines for Evaluating the
Environmental Effects of
Radiofrequency Radiation

ORDER EXTENDING TIME FOR COMMENTS AND REPLY COMMENTS

Adopted: August 3, 1993; Released: August 4, 1993

Comment Date: November 12, 1993
Reply Comment Date: December 13, 1993

By the Chief, Office of Engineering and Technology:

1. On July 9, 1993, the National Association of Broadcasters (NAB) filed a "Request for Extension of Time" with the Commission in the above-named proceeding. The NAB requested that the Commission extend, by a period of ninety (90) days, the time for filing comments until November 12, 1993 and the filing date for reply comments until December 13, 1993. The deadline originally established for filing comments was August 13, 1993, and the date for reply comments was September 13, 1993. The Electromagnetic Energy Policy Alliance (EEPA) and CBS, Inc., have filed comments in support of the NAB's request.

2. The NAB has requested the extension in order to complete a study to develop non-measurement-based techniques for complying with the proposed new radiofrequency (RF) exposure guidelines.[1] The Commission has proposed to incorporate into its rules the newly revised standard of the American National Standards Institute (ANSI) and the Institute of Electrical and Electronics Engineers (IEEE) designated IEEE C95.1-1991 (also ANSI/IEEE C95.1-1992).[2]

3. The NAB points out that the new ANSI/IEEE standard is significantly different than the one it replaces, including new restrictions on currents induced in the human body by RF fields and the specification of two sets of exposure limits. The NAB believes that its study will help the Commission interpret and implement the new guidelines by providing essential technical information relevant to compliance procedures.

4. The NAB study will evaluate the impact of the new standard on compliance methods specified in the Commission's OST Bulletin No. 65; suggest modifications to existing charts and tables in the bulletin; and develop any new charts and tables that may be necessary to demonstrate compliance with either the maximum permissible exposure (MPE) limits or the induced and contact current limits contained in the new standard. The NAB believes that this information will provide a less burdensome set of alternatives, both for licensees and for the Commission, with respect to evaluating compliance with the new guidelines.

5. According to the NAB, it is not possible for its study to be completed within the existing time frame for submission of comments in this proceeding due to the complex nature of the work involved. The NAB notes that the new standard will have significant impact for the broadcast industry and for other telecommunications services. Therefore, because of the potential benefit that the study results can have for the Commission and for its regulatees, the NAB is requesting the extension in time for filing comments. The EEPA also notes that several of its member organizations have initiated research to support comments on the Commission's proposal.

6. The Commission does not routinely grant requests for extensions of time.[3] However, we recognize the usefulness of the NAB study, and, in this case, we agree that there are extenuating circumstances warranted the granting of additional time. We believe that the public interest will be served by this extension and that the additional time will be to the benefit of all concerned parties in helping assure that new guidelines will be implemented in a reasonable and accurate manner.

7. As noted, the new ANSI/IEEE standard is complex, and a considerable amount of time and effort will be required in order to develop the data and information necessary for its implementation. We expect that the NAB study will provide the Commission with important results that will be very helpful to us in updating our technical bulletin and providing essential guidance to our regulatees with respect to compliance with the new guidelines. We are pleased that the NAB is undertaking this effort, and we agree that an extension of three months is supportable in view of the nature of the research and analytic work required.

8. Accordingly, IT IS ORDERED THAT the deadline for filing comments IS EXTENDED to November 12, 1993, and the deadline for filing reply comments IS EXTENDED to December 13, 1993. This action is taken pursuant to Sections 4(i) and 303 of the Communications Act of 1934, as amended, 47 U.S.C. Sections 154(i) and 303, and pursuant to Sections 0.31, 0.241 and 1.46 of the Commission's Rules, 47 C.F.R. Sections 0.31, 0.241 and 1.46.

FEDERAL COMMUNICATIONS COMMISSION

Thomas P. Stanley
Chief Engineer

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[1] *See Notice of Proposed Rule Making* in ET Docket 93-62, 8 FCC Rcd 2849 (1993).
[2] *Id.*, Note 1 at paragraph 1.
[3] 47 C.F.R. Section 1.46 (1991).

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

Bell Atlantic Telephone Companies
Centel Telephone Company
Southwestern Bell Telephone Company
United Telephone Companies

Zone Density Pricing Plans

ORDER

Adopted: August 4, 1993; Released: August 4, 1993

By the Acting Chief, Common Carrier Bureau:

I. INTRODUCTION

1. By this Order, we approve zone density pricing plans filed by the above-captioned local exchange carriers (LECs).[1] As discussed further below, we find that the filed plans, as supplemented, reasonably implement the density pricing authorized by the Commission in the *Special Access Order*.[2] These four LECs may now file tariff revisions, to be effective on not less than 31 days' notice, to implement their zone density pricing plans.

II. BACKGROUND

A. Commission Requirements

2. In the *Special Access Order*, the Commission granted all Tier 1 LECs, except those companies which remain in the National Exchange Carrier Association pool, additional pricing flexibility in order to bring their special access rates more in line with their costs.[3] To implement this additional pricing flexibility, the Commission permitted each affected LEC to establish, subject to Commission approval, zones within each study area and required each central office to be assigned to one of the zones. Once plans are approved, LECs may file tariffs establishing different rates in each zone. The Commission required the LECs to show they assigned each central office to a zone using criteria reflecting cost-related characteristics, although geographic contiguity could, under certain conditions, be a secondary, less important consideration.[4] On June 18, 1993, the Common Carrier Bureau released an order approving the zone density plans filed by six LECs.[5] In this order, we approve the plans of four more LECs.

B. The Zone Density Plans

3. As a general matter, these four LECs followed a three step procedure to develop their zone plans. First, they ranked their wire centers in order of decreasing traffic density. Next, they divided their rank-ordered offices into three groups. These groups were designated zone one, two, and three, where zone one contains the rank-ordered wire center group having the highest traffic density. Finally, most of the LECs adjusted the zone assignments (for reasons of geographic contiguity or community of interest between the areas served by the end offices.

4. The LECs used a variety of methodologies to rank their central offices. All four LECs used both interstate and intrastate traffic on the theory that using total traffic volume reflects traffic costs more accurately than interstate traffic volume alone. Bell Atlantic and SWB initially ranked offices according to their levels of switched and special access traffic before developing a single rank order. Centel and United converted switched and special access traffic levels into equivalent DS1s, by which the offices were then ranked from most dense to least dense. Centel, SWB and United used state-specific rankings, while Bell Atlantic used a region-wide ranking method.

5. Once Bell Atlantic, SWB and United ranked their offices, they assigned them to one of three zones. Centel generally used three zones, but created only two zones in North Carolina. To create the zones, the carriers selected breakpoints between zones which would roughly equalize the traffic among the zones. Bell Atlantic, for example, selected breakpoints to distribute its switched traffic volume evenly among three zones. SWB used breakpoints that placed equal volumes of traffic into each of the three zones for each of its switched and special rankings. It then combined the two using a rank sum method.[6]

6. Finally, Bell Atlantic, SWB and United adjusted end office zone assignments to reflect factors such as geographic contiguity or community of interest between the areas served by the end offices. Bell Atlantic moved one office, and SWB moved two offices, from zone two to zone one

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[1] On February 16, 1993, zone density pricing plans were filed by Bell Atlantic Telephone Companies (Bell Atlantic), Centel Corporation (Centel), Southwestern Bell Telephone Company (SWB), and United Telephone Companies (United). On March 12, 1993, the filing LECs each submitted additional supporting information requested by the Common Carrier Bureau. After further examination of the plans, the Bureau requested, and received, clarification from Bell Atlantic and Centel/United.

[2] Expanded Interconnection with Local Telephone Company Facilities, CC Docket No. 91-141, and Amendment of the Part 69 Allocation of General Support Facility Costs, CC Docket No. 92-222, (Report and Order and Notice of Proposed Rulemaking, 7 FCC Rcd 7369 (1992)(*Special Access Order*), *recon.*, 8 FCC Rcd 127 (1992), *pets. for recon. pending, appeal pending sub nom. Bell Atlantic Corp. v. FCC*, No. 92-1619 (D.C. Cir., filed Nov. 25, 1992).

[3] *See Special Access Order*, 7 FCC Rcd at 7373.

[4] *See* Section 61.38(b)(4) of the Commission's Rules, 47 C.F.R. § 61.38(b)(4); *see also Special Access Order*, 7 FCC Rcd at 7455 and n.415.

[5] BellSouth Telecommunications, Inc., GTE Service Corporation, Lincoln Telephone and Telegraph Co., NYNEX Telephone Companies, Pacific Bell, and Rochester Telephone Corporation Zone Density Pricing Plans, DA 93-726 (rel. June 18, 1993)(*First Zone Density Order*).

[6] Bell Atlantic Supplemental Plan at Att. 3; SWB Plan at 2-3. *See also* Centel/United zone plans. To select breakpoints for its special access traffic, Bell Atlantic grouped the wire centers according to the types and capacities of carrier systems the central offices contained. Bell Atlantic Supplemental Plan at Att. 3.

for contiguity or community of interest reasons. Bell Atlantic, SWB, and United moved thirty-five, eighteen and three offices, respectively, from zone three to zone two for contiguity or community of interest reasons. Bell Atlantic also moved one office from zone two to zone one in order to have at least one office in each of its study areas classified in zone one.

C. Pleadings

7. On March 26, 1993, seven parties[7] filed comments concerning these LECs' zone plans.[8] Each of the LECs replied on April 16.[9] Generally, the commenters object to the methodologies employed by the LECs to develop the plans. [10] They contend that the plans do not comply with the Commission's requirement that central offices be assigned to zones in a way that reflects their cost-related characteristics.[11] The LECs reply that their zone plans conform to the requirements set forth in the *Special Access Order*.

8. Specific challenges to the Bell Atlantic, Centel, SWB and United zone plans, and the LECs' responses, are discussed in further detail in the next section. As noted above, the commenters also challenged the plans on broad bases that apply to more than one plan. These more general issues were addressed and resolved in the *First Zone Density Order* (*see* ¶ ¶ 11-23). By reference, we are incorporating our previous discussion of those generic issues in this Order.

III. DISCUSSION

9. In this section, we address the commenters' specific challenges to the four plans and the LECs' responses. We have reviewed these challenges, and the related pleadings at issue in this Order. We conclude that the zone plans reflect cost-related characteristics based on traffic density, as the Commission intended in the *Special Access Order*. Accordingly, we approve the plans, as supplemented. The LECs may proceed to file tariffs implementing the zone plans on 31 days' notice.[12]

10. *Bell Atlantic*. Several commenters complain that Bell Atlantic ranked switched and special access traffic separately, even though the Commission directed the LECs to consider a combined measure of switched and special access traffic.[13] We are not persuaded by these commenters' objections to the Bell Atlantic methodology. The Commission required LECs to consider both switched and special access traffic, but did not require the LECs to use a particular method to account for each type of traffic. Bell Atlantic ranked offices according to their levels of switched and special access traffic separately and assigned offices to one of three groups. It then assigned each office to the most dense zone if either the separate switched or special access traffic rankings justified such a result.[14] We note that, in any event, combining switched and special access traffic to rank wire centers would have had no impact on office rankings. Accordingly, we reject the petitioners' challenge on this basis.

11. We also reject the MCI argument that Bell Atlantic should not be permitted to assign offices to zone one in states previously lacking offices in that zone because such moves are not cost based.[15] These adjustments to the zone rankings simply recognize potential state-related cost differences.

12. *Centel/United*.[16] MFS argues that the Centel and United plans relied on vague, subjective factors to assign wire centers to zones, do not specify which study areas are affected or what break-points were used, and do not explain how distributing traffic evenly across zones relates to office cost characteristics.[17] Centel/United reply that they used the exchange area, contiguity, and community of interest standards allowed in the *Special Access Order* to move offices among zones. They claim that the Commission required a volume-of-traffic showing, but did not require all zones to have identical density characteristics.[18]

13. Centel/United ranked their offices on a state-by-state basis and then examined the office rankings and their traffic volumes to determine a logical breakpoint that also roughly equalized the traffic among zones. Except in Florida, Nevada, North Carolina, and Ohio, Centel/United used three DS3s as the breakpoint between zones one and two, and one DS3 as the breakpoint between zones two and three. For the reasons stated in the *First Zone Density Order*, the equalization of traffic among zones is an acceptable consideration when establishing zone breakpoints.[19] We have reviewed the office assignments and find that the

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[7] MCI Communications Corporation (MCI) and MFS Communications Company, Inc. (MFS) protested the Bell Atlantic, Centel, SWB and United plans. Ad Hoc Telecommunications Committee (Ad Hoc); (Competitive Telecommunications Association (CompTel); and WilTel, Inc. (WilTel) protested only the Bell Atlantic, Centel and United plans. Sprint Communications Co. (Sprint) and Teleport Communications Group, Inc. (Teleport) did not object to specific plans, but offered general observations concerning all the plans.

[8] On March 23, 1993, MFS filed an Emergency Petition to Hold Proceedings in Abeyance. On June 21, it filed a Supplemental Petition. In those petitions, MFS seeks deferral of the approval of the LECs' zone density plans until the Common Carrier Bureau completes its inquiry into the reasonableness of LEC special access volume and term discounts. The Bureau denied the MFS Petition insofar is it related to the zone plans approved in that Order. *See First Zone Density Order* at ¶ 36 and n.15. We deny MFS' petition insofar as it relates to the instant zone plans for the same reasons stated in that Order.

[9] Centel and United filed a joint reply.

[10] *See, e.g.*, MFS Comments at 5-7. *See also* CompTel Comments at 6 n.6; MFS Comments at 6; WilTel Comments at 7-8 and n.10; Bell Atlantic Reply at 3; SWB Reply at 4.

[11] *See, e.g.*, Ad Hoc Comments at 8-9; CompTel Comments at 8-9; MFS Comments at 8; WilTel Comments at 6-7.

[12] LECs should not file zone pricing tariffs until such time as they believe expanded interconnection will be operational within 31 days. *Special Access Order*, 7 FCC Rcd at 7456. The tariffs shall contain provisions setting forth the rates, terms and conditions applicable to interoffice links. *See* Section 69.123(d)(1) of the Commission's Rules, 47 C.F.R. § 69.123(d)(1).

[13] *See, e.g.*, Ad Hoc Comments at 13; MCI Comments at 7; WilTel Comments at 10.

[14] For example, an office in zone one for switched and zone two for special access was assigned to zone one.

[15] *See* MCI Comments at 7-8.

[16] Centel and United filed separate initial plans that reflected common approaches, but filed a joint reply. Accordingly, we are addressing their plans together.

[17] MFS Comments at 12-13; *accord* Ad Hoc Comments at 4-7.

[18] United/Centel Reply at 7-8.

[19] *See First Zone Density Order* at ¶ ¶ 7, 18-19.

zone breakpoints selected by Centel/United exhibit a reasonable division that groups offices in zones with common cost-related characteristics based on traffic density rankings. Centel/United's supplemental filings listed the office codes of all the offices it placed in each zone, and specified the breakpoints that it used in each state.[20] Finally, we address United's office classification in the Johnson City, Tennessee, exchange. United generally assigned offices to the same zone if they were in the same exchange. United states, however, that it did not assign the two Johnson City offices to the same zone, as the offices are not proximately located. In that exchange, United placed one central office in zone one and one central office in zone two. The exchange is only one part of a larger urban area. That area has other offices similar in size to the smaller Johnson City office, all of which were assigned to zone two. Thus, we find United's classification to be reasonable. Accordingly, we approve the Centel/United plans, as supplemented.

14. *SWB.* Some commenters argue that SWB considered multiple traffic measurements for each wire center, rather than a combined approach, and used subjective methods to develop a single ranked listing of wire centers.[21] Ad Hoc urges rejecting SWB's method of rank ordering wire centers, contending that, by combining two separate, unweighted rankings of switched and special access traffic for each wire center, the final rank ordering of SWB's wire centers will be skewed.[22] MFS alleges that SWB moved several offices into lower-density zones.[23] MCI asserts that the state-by-state rankings used by SWB should be rejected because offices of equal density in different states would be placed in different zones.[24]

15. SWB replies that the Commission did not direct the LECs to reduce special and switched access usage to a "common denominator," but rather, merely directed the LECs to use a method accounting for both switched and special traffic. It contends that finding a common denominator to calculate combined traffic volumes involving services so different as switched and special access is impossible without employing some form of inherently arbitrary method.[25] SWB also argues that MFS has incorrectly read its plan when it complained that SWB moved several offices into a lower-density zone. Finally, SWB claims that differences between states exist in traffic density and market conditions that justify the use of state-by-state office rankings.[26]

16. We conclude that SWB has used a method that reasonably accounts for both switched and special access traffic. LECs were not required to use a particular method of accounting for the levels of switched and special access traffic. We find that SWB's approach reflects cost-related characteristics based on traffic density. Ad Hoc has not demonstrated how SWB's methodology has skewed its ranking of wire centers. Moreover, SWB's method clearly accounts for both switched and special traffic volume through each of its wire centers as required by the Commission's Order. Accordingly, we conclude that SWB's methodology results in a ranking that reasonably reflects the cost-related characteristics of its wire centers.

17. We also note that SWB moved offices into higher, not lower, density zones. The maps supplied by SWB showed that the two offices it moved from zone two to zone one bordered other zone one offices, and that the eighteen offices it moved from zone three to zone two bordered other zone two offices. This movement to a higher-density zone was permitted by the Commission's Order. Accordingly, we find the office reassignments based on contiguity or community of interest to be reasonable and within the scope of the *Special Access Order.*

18. Finally, we conclude that it was reasonable for SWB to use a state-by-state ranking approach to assign central offices to zones in a study area. The Commission's Rules do not prohibit the LECs' use of a state-by-state ranking approach to implement zone density pricing. Moreover, because traffic density is a surrogate for costs, the cost characteristics of offices in zone one in one state may be different from the cost characteristics of offices in a state without zones, and may be different from a zone one office in a different state. Accordingly, we find that state-by-state office rankings will not, of themselves, lead to unreasonably discriminatory rates.

IV. CONCLUSION

19. We have reviewed the captioned zone density pricing plans as supplemented, the comments thereon, the replies, and the additional supporting materials filed by the parties in this proceeding. We find that the plans reasonably implement the zone density pricing scheme envisioned by the Commission in the *Special Access Order.* We therefore approve the plans.

V. ORDERING CLAUSES

20. ACCORDINGLY, IT IS ORDERED that, pursuant to Section 4(i) of the Communications Act, 47 U.S.C.§ 154(i), and Section 0.291 of the Commission's Rules, 47 CFR § 0.291, the zone density pricing plans filed by the Bell Atlantic Telephone Companies, Centel Corporation, Southwestern Bell Telephone Company, and United Telephone Companies ARE APPROVED.

21. IT IS FURTHER ORDERED that the Emergency Petition to Hold Proceedings in Abeyance, and the Supplemental Petition, filed by MFS Communications Company, ARE DENIED to the extent they relate to the plans approved by this Order.

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[20] *See* United and Centel Supplemental Plans.

[21] Ad Hoc Comments at 13; MCI Comments at 7; MFS Comments at 4-5, 5 n.5; WilTel Comments at 10.

[22] Ad Hoc Comments at 13. To develop its rankings, SWB first ranked wire centers from highest to lowest density based on switched traffic and special access traffic separately. It then divided the wire centers into three groups containing equal amounts of traffic, giving values of one, two, or three to each grouping in descending order of density. Finally, it combined the lists by computing the rank sums for each wire center. For example, a wire center assigned to group one because of its switched access volume ranking, and assigned to group two because of its special access traffic volume would have a rank sum of three. SWB assigned wire centers with rank sums of less than four into its pricing zone one. It assigned wire centers with rank sums of four into its pricing zone two, and assigned wire centers with a rank sum of five or six into its pricing zone three. *See* SWB Plan at 2-3.

[23] MFS Comments at 10.

[24] MCI Comments at 8-9; *see also* Ad Hoc Comments at 12-13.

[25] SWB Reply at 6-7.

[26] SWB Reply at 9-10.

FEDERAL COMMUNICATIONS COMMISSION

Kathleen B. Levitz
Acting Chief
Common Carrier Bureau

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

AT&T Communications	Transmittal Nos. 5119,
Tariff F.C.C. No. 2	5532, and 5548

ORDER

Adopted: August 4, 1993; Released: August 4, 1993

By the Chief, Tariff Division, Common Carrier Bureau:

1. On May 7, 1993, AT&T Communications (AT&T) filed Transmittal No. 5119 on 14 days' notice pursuant to special permission granted by the Common Carrier Bureau.[1] This filing introduces a promotion for AT&T 800 Customer Specific Term Plan II and an AT&T Location and Service Specific Term Plan II promotion. The transmittal is scheduled to become effective on August 5, 1993.[2]

2. On May 14, 1993, MCI Telecommunications Corporation (MCI) filed a petition to reject Transmittal No. 5119. AT&T replied on May 17, 1993.

3. The Common Carrier Bureau has reviewed AT&T Communications Transmittal No. 5119, as clarified, and all associated pleadings. We conclude that no compelling argument has been presented that the tariff revisions are so patently unlawful as to require rejection, and that no question has been presented that warrants investigation at this time.

4. Accordingly, IT IS ORDERED that the petition to reject AT&T Communications Tariff F.C.C. No. 2, Transmittal No. 5119, filed by MCI Telecommunications Corporation IS DENIED.

FEDERAL COMMUNICATIONS COMMISSION

Gregory J. Vogt
Chief, Tariff Division
Common Carrier Bureau

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[1] Application No. 1527 for Special Permission for Continuing Waiver of Section 61.58 of the Commission's Rules, 47 C.F.R. § 61.58 (filed Jan. 22, 1993); Special Permission No. 93-87 (granted Jan. 29, 1993).

[2] The Bureau extended the effective date of the transmittal to August 5, 1993. AT&T subsequently filed Transmittal Nos. 5532 and 5548 to clarify language contained in the original transmittal. Application No. 1526 for a Continuing Waiver of Sections 61.58 and 61.59 of the Commission's Rules, 47 C.F.R. §§ 61.58, 61.59 (filed Jan. 29, 1993); Special Permission No. 93-86 (granted Jan. 29, 1983); AT&T Communications Tariff F.C.C. No. 2, Transmittal Nos. 5532 (filed Jul. 30, 1993) and 5548 (filed Aug. 3, 1993).

FEDERAL COMMUNICATIONS COMMISSION

Before the
Federal Communications Commission
Washington, D.C. 20554

PUBLIC NOTICE

Released: August 6, 1993

GTE Service Corporation Files
Petition for Exemption from the Commission's
Physical Collocation Requirement

CC Docket No. 91-141

Pleading Cycle Established

Comments Due: August 16, 1993
Replies Due: August 23, 1993

On July 9, 1993, GTE Service Corporation (GTE) filed a petition for exemption from the Commission's requirement to file physical collocation tariffs at one central office located in San Bernardino, California. *See* Expanded Interconnection with Local Telephone Company Facilities, CC Docket No. 91-141, 7 FCC Rcd 7369 (1992) (*Expanded Interconnection Order*). GTE previously sought exemption for this office on the basis of lack of space. The Common Carrier Bureau (Bureau) denied GTE's petition for this central office because it found that it based its reservations of space for future use on an unreasonably long forecasting period. *See* Expanded Interconnection with Local Telephone Company Facilities, Petitions for Exemption from Physical Collocation Requirement, CC Docket No. 91-141, DA 93-658, released June 9, 1993. GTE now seeks exemption from the Commission's physical collocation requirement for its San Bernardino central office, claiming it overstated the amount of available space at this central office, and that space will be exhausted by 1995.

Interested parties filing comments or oppositions to GTE's petition are invited to do so no later than **August 16, 1993**. Parties filing replies may do so no later than **August 23, 1993**.

An original and five copies of all pleadings shall be filed with the Secretary of the Commission. In addition, one copy shall be delivered to the Commission's commercial copying firm, International Transcription Service, Suite 140, 2100 M Street, N.W., Washington, D.C. 20037. Also, one copy shall be delivered to the Tariff Division, Room 518, 1919 M Street, N.W., Washington, D.C. 20554.

Copies of GTE's petition and other related documents may be obtained from International Transcription Service. The documents are also available for public inspection and copying in Room 518, 1919 M Street, N.W., Washington, D.C. 20554.

For further information, contact Steven Spaeth, Tariff Division, Common Carrier Bureau at (202) 632-6917.

FEDERAL COMMUNICATIONS COMMISSION

Before the
Federal Communications Commission
Washington, D.C. 20554

PUBLIC NOTICE

Released: August 6, 1993

COMMENTS INVITED ON DEPRECIATION RATE PRESCRIPTIONS PROPOSED FOR DOMESTIC TELEPHONE CARRIERS.

The Common Carrier Bureau invites comments on proposed depreciation rates and amortizations for 10 local exchange carriers (LECs). The proposed rates for these LECs were developed in conjunction with the Commission's standard review procedures.

Each of the 10 carriers submitted studies to the Commission in support of its proposed depreciation rates. The carriers' submissions were reviewed by the staffs of the state public utility commissions and the Common Carrier Bureau. The carriers' studies and the corresponding staff reviews were discussed in correspondence, telephone conversations, and/or conferences. Each of the carriers thereafter formally filed updated studies which contained the data required by Section 43.43 of the Commission's rules. The rates filed by the carriers are consistent with those proposed by the Bureau staff for all carriers.

The Attachment lists the 10 LECs and the affected jurisdictions. This Attachment also lists the proposed expenses and composite rates for the LECs, the current expenses and composite rates (developed using the currently prescribed depreciation rates and amortizations), and the percentage change in expenses (proposed vs. current).

The Bureau staff is recommending the life, salvage, and curve shape parameters which underlie the expenses and composite rates shown on the Attachment. These expenses are estimated annual amounts and may not reflect actual expenses because January 1, 1993 plant balances are used and the proposed rates may not be applicable for the entire year.

Copies of the carriers' initial 1993 depreciation rate study submissions, the Bureau staff's preliminary reports on these submissions, the rate filings and other data supporting the proposed rates are available for public inspection in Suite 257, 2000 L Street N.W., Washington, D.C. Copying facilities are available in Suite 812, 2000 L Street. Copies are also available from the International Transcription Service, Inc., Room 246, 1919 M Street, N.W., Washington, D.C.

Parties wishing to file comments on the proposals summarized herein may do so by August 27, 1993. Replies may be filed by September 10, 1993. Comments and reply comments should include in the caption a reference to file no. AAD 93-91. A copy of the comments and replies should be provided to the Chief, Depreciation Rates Branch.

For additional information contact Ms. Fatina Franklin, Chief, Depreciation Rates Branch, (202) 632-7500.

SUMMARY OF PROPOSED CHANGES IN ANNUAL DEPRECIATION EXPENSE BY JURISDICTION

Carrier - Jurisdiction	Investment	Annual Depreciation Expense and Composite Rate					
		Current		Proposed		Proposed Change	
		Expense	Percent	Expense	Percent	Expense	Percent
	($000)	($000)	(%)	($000)	(%)	($000)	(%)
BELLSOUTH TELECOMMUNICATIONS							
Alabama	3,649,939	269,692	7.4	259,680	7.1	(10,012)	-3.7
Kentucky	1,994,911	131,238	6.6	136,750	6.9	5,512	4.2
Louisiana	3,883,380	258,772	6.7	258,337	6.7	(435)	-0.2
Mississippi	2,412,119	176,150	7.3	187,080	7.8	10,930	6.2
Tennessee	3,749,963	247,438	6.6	313,744	8.4	66,306	26.8
C&P OF VIRGINIA	4,548,863	308,214	6.8	358,727	7.9	50,513	16.4
C&P OF WEST VIRGINIA	1,407,163	99,263	7.1	102,407	7.3	3,144	3.2
GTE NORTH							
Indiana	1,613,269	108,235	6.7	108,917	6.8	682	0.6
Ohio	1,339,065	87,553	6.5	89,065	6.7	1,512	1.7
Pennsylvania	987,231	55,454	5.6	58,891	6.0	3,437	6.2
Wisconsin	873,775	51,973	5.9	53,441	6.1	1,468	2.8
GTE SOUTH							
Alabama	300,169	21,451	7.1	23,822	7.9	2,371	11.1
South Carolina	330,477	23,231	7.0	24,683	7.5	1,452	6.3
Tennessee	108,432	6,935	6.4	9,458	8.7	2,523	36.4
Virginia	71,389	4,111	5.8	6,081	8.5	1,970	47.9
GTE-Virginia #	827,370	47,869	5.8	52,565	6.4	4,696	9.8
GTE SOUTHWEST							
Arkansas	172,877	10,609	6.1	12,076	7.0	1,467	13.8
New Mexico	89,383	5,446	6.1	4,937	5.5	(509)	-9.3
Oklahoma	281,333	16,684	5.9	17,071	6.1	387	2.3
Texas	3,081,731	193,881	6.3	206,434	6.7	12,553	6.5
NEW ENGLAND TELEPHONE							
Maine	1,176,917	78,763	6.7	91,675	7.8	12,912	16.4
Massachusetts	6,785,791	453,787	6.7	506,658	7.5	52,871	11.7
New Hampshire	1,304,885	88,965	6.8	93,701	7.2	4,736	5.3
Rhode Island	817,410	49,823	6.1	58,730	7.2	8,907	17.9
Vermont	657,361	46,710	7.1	52,547	8.0	5,837	12.5
OHIO BELL	5,258,065	332,235	6.3	377,149	7.2	44,914	13.5
SOUTHERN NEW ENGLAND	3,796,351	249,666	6.6	288,282	7.6	38,616	15.5
U S WEST COMMUNICATIONS							
Idaho	686,368	42,813	6.2	47,298	6.9	4,485	10.5
Montana	696,935	42,976	6.2	47,661	6.8	4,685	10.9
Oregon	1,904,971	122,221	6.4	133,474	7.0	11,253	9.2
Washington	3,647,612	228,583	6.3	259,589	7.1	31,006	13.6
TOTAL	58,455,505	3,860,741	6.6	4,240,930	7.3	380,189	9.8

Formerly Contel of Virginia.

Before the
Federal Communications Commission
Washington, D.C. 20554

CC Docket No. 93-162

In the Matter of

Local Exchange Carriers' Rates for
Expanded Interconnection for
Special Access

Bell Atlantic Telephone Companies, Revisions to Tariff F.C.C. No. 1	Transmittal Nos. 584 and 585
GTE System Telephone Companies Revisions to Tariff F.C.C. No. 1	Transmittal No. 49
GTE Telephone Operating Companies Revisions to Tariff F.C.C. No. 1	Transmittal No. 802
Southwestern Bell Telephone Company Revisions to Tariff F.C.C. No 73	Transmittal No. 2285

MEMORANDUM OPINION AND ORDER

Adopted: August 4, 1993; Released: August 4, 1993

By the Associate Chief, Common Carrier Bureau:

1. On June 9, 1993, the Common Carrier Bureau (Bureau) released the *Expanded Interconnection Tariff Order,* which suspended the expanded interconnection tariffs of several local exchange carriers (LECs) and initiated an investigation into the lawfulness of those tariffs.[1] These tariffs were filed to comply with the *Expanded Interconnection Order,* which required most Tier 1 LECs to permit competitors and users to terminate their own special access transmission facilities at LEC central offices and interconnect with LEC special access services.[2] The *Expanded Interconnection Order* mandated interconnection through the provision of physical collocation. However, the Commission also decided to exempt particular central offices from the physical collocation requirement if LECs could make a factual showing that those offices did not have sufficient unused space for physical collocation.[3]

2. The *Expanded Interconnection Tariff Order* directed carriers to reflect changes in the general support facilities (GSF) allocation factor in their expanded interconnection rates.[4] Simultaneously with their compliance filings, Bell Atlantic Telephone Company (Bell Atlantic) and Southwestern Bell Telephone Company (Southwestern Bell) proposed other revisions related to expanded interconnection rates.[5] Bell Atlantic intends to reduce its DS1 and DS3 connection rates to reflect removal of the network cable rack between the collocator's cage and Bell Atlantic's network.[6] Southwestern Bell's original expanded interconnection offering permitted interconnectors to use only 100 AMPs of direct current (DC) voltage to interconnectors' cages. Southwestern Bell plans to add an optional rate element for 40 AMPs of DC voltage.[7] No petitions were filed against either of these tariffs.

3. Also on June 9, 1993, the Bureau ordered Bell Atlantic and GTE Service Corporation (GTE)[8] to file physical collocation tariffs for specific central offices for which their petitions for exemption were denied.[9] These tariffs were filed on July 9, 1993, with a scheduled effective date of August 9, 1993 for Bell Atlantic, and August 8, 1993, for the GTE tariffs. No petitions have been filed against any of these tariffs.

4. For the same reasons stated in the *Expanded Interconnection Tariff Order,* the rates before us raise significant questions of lawfulness regarding cost allocations, rate levels, rate structures, and terms and conditions of service.[10] Accordingly, the transmittals will become effective following a one-day suspension, and be included in the investigation initiated in the *Expanded Interconnection Tariff Order.*[11] These rates will also be subject to an accounting order to facilitate any refunds that later prove necessary.[12]

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[1] Ameritech Operating Companies, *et. al,* CC Docket No. 93-162, DA 93-657, released June 9, 1993 (*Expanded Interconnection Tariff Order).*

[2] Expanded Interconnection with Local Telephone Company Facilities, CC Docket No. 91-141, 7 FCC Rcd 7369 (1992) (*Expanded Interconnection Order).* The *Expanded Interconnection Order* excluded members of National Exchange Carrier Association (NECA) pools from this filing requirement. Puerto Rico Telephone Company is the only Tier 1 carrier participating in NECA pools. *Expanded Interconnection Order,* 7 FCC Rcd at 7398.

[3] *Expanded Interconnection Order,* 7 FCC Rcd at 7390-91 (para. 41), 7407-08 (paras. 77-80), n.190.

[4] *Expanded Interconnection Tariff Order,* para. 41. *See also* Amendment of the Part 69 Allocation General Support Facility Costs, CC Docket No. 92-222, 8 FCC Rcd 3697 (1993).

[5] Specifically, Bell Atlantic filed Transmittal No. 585 on July 16, 1993, on 45 days notice, and Southwestern Bell filed Transmittal No. 2285 on July 14, 1993, on 45 days notice.

[6] Bell Atlantic Transmittal No. 585, Description and Justification (D&J) at 1-2.

[7] Southwestern Bell Transmittal No. 2285, D&J at 1.

[8] GTE does business as the GTE affiliated Telephone Operating Companies and the GTE System Telephone Companies.

[9] Expanded Interconnection with Local Telephone Company Facilities, Petitions for Exemption from Physical Collocation Requirement, CC Docket No. 91-141, DA 93-658 (released June 9, 1993) at paras. 15-16 (*Exemption Order).* Bell Atlantic filed Transmittal No. 584, GTE Telephone Operating Companies filed Transmittal No. 802, and GTE System Telephone Companies filed Transmittal No. 49.

[10] *Expanded Interconnection Tariff Order,* para. 7.

[11] Bell Atlantic and Southwestern Bell are also required to advance the effective dates of Bell Atlantic Transmittal No. 585 and Southwestern Bell Transmittal No. 2285 to August 6, 1993. These tariffs will be suspended for one day, and then take effect.

[12] The Bureau has designated issues in this investigation. *See*

5. Accordingly, IT IS ORDERED that Bell Atlantic Telephone Companies and Southwestern Bell Telephone Company SHALL FILE tariff revisions, to be effective on August 6, 1993, in order to advance the effective date of Bell Atlantic Transmittal No. 585 and Southwestern Bell Transmittal No. 2285.

6. IT IS FURTHER ORDERED that, pursuant to Section 204(a) of the Communications Act of 1934, 47 U.S.C. § 204(a), and Section 0.291 of the Commission's Rules, 47 C.F.R. § 0.291, the tariff revisions contained in the tariff transmittals referenced above ARE SUSPENDED for one day and an investigation of the referenced tariff transmittals IS INSTITUTED.

7. IT IS FURTHER ORDERED that the local exchange carriers listed above SHALL FILE tariff revisions reflecting the suspension no later than five days from the release date of this Order.

8. IT IS FURTHER ORDERED that, for these purposes, we waive Sections 61.56, 61.58 and 61.59 of the Commission's Rules, 47 C.F.R. §§ 61.56, 61.58, 61.59, and assign Special Permission No. 93-659.

9. IT IS FURTHER ORDERED that, pursuant to Section 204(a) of the Communications Act of 1934, 47 U.S.C. § 204(a), the local exchange carriers listed above shall keep accurate account of all amounts received by reason of the rates that are the subject of this investigation.

FEDERAL COMMUNICATIONS COMMISSION

Jill Ross Meltzer
Associate Chief
Common Carrier Bureau

Local Exchange Carriers' Rates, Terms, and Conditions for Expanded Interconnection for Special Access, CC Docket No. 93-162, DA 93-951 (released July 23, 1993).

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

800 Data Base Access Tariffs and the 800 Service Management System Tariff	**CC Docket No. 93-129**
Investigation of Special Access Tariffs of Local Exchange Carriers	**CC Docket No. 85-166, Phase II, Part 1 and Phase III, Part 1**
Local Exchange Carriers' Rates, Terms, and Conditions for Expanded Interconnection for Special Access	**CC Docket No. 93-162**

ORDER

Adopted: August 4, 1993; Released: August 5, 1993

By the Chief, Tariff Division, Common Carrier Bureau:

1. *800 Data Base Investigation.* The Common Carrier Bureau (Bureau) recently released separate orders in the above captioned dockets, setting forth filing schedules for direct cases or reports by local exchange carriers (LECs) to justify various rates. Due to the overlapping filing deadlines, several LECs have requested extensions of the deadlines in each of these proceedings. In this Order, we grant extensions in these proceedings. On July 19, 1993 the Common Carrier Bureau released an Order[1] that required local exchange carriers (LECs) to file their direct cases concerning 800 data base access tariffs on August 19, 1993. On July 26, 1993, Pacific Bell and Nevada Bell (Pacific) filed a motion to extend time to file its direct case, requesting that the deadline for filing direct cases be extended until September 20, 1993. Pacific contends that the variety of issues and sub-issues presented for extensive comment, as well as the request that price cap carriers respond to data requests, constitute a heavy workload. In addition, Pacific asserts that comments on two other major proceedings are due during the same time frame. The Tariff Division has reviewed Pacific's request for extension of time and has determined that good cause has been shown to grant an extension, as requested, to all parties. Therefore, direct cases are now due on September 20, 1993. Pleadings responding to the direct cases must be filed by October 20, 1993, while rebuttals to oppositions or comments are due on November 1, 1993.

2. *OCC Discount Remand Proceeding.* Southwestern Bell Telephone Company (Southwestern Bell), on July 29, 1993, filed a motion to extend by 120 days the time for filing the reports required by the *OCC Discount Remand Order*.[2] Southwestern Bell claims that the employees most familiar with this proceeding have retired, and that other employees who could become familiar on short notice are also working on Southwestern Bell's annual access and expanded interconnection filings.[3] Southwestern Bell also claims that additional time is required to find the data for the request because Southwestern Bell has just moved to a new building.[4] Finally, Southwestern Bell maintains that substantial work is required to disaggregate its data according to customers who were parties to the Docket No. 20099 Settlement Agreement and those who were not.[5] The Division has reviewed Southwestern Bell's request for extension of time and has determined that good cause exists to grant an extension of 75 days to all parties. Therefore, reports required by the *OCC Discount Remand Order* are due on October 26, 1993. Pleadings responding to the reports must be filed on November 10, 1993; rebuttals to oppositions or comments must be filed by November 29, 1993.

3. *Expanded Interconnection Investigation.* On July 28, 1993, Bell Atlantic Telephone Companies (Bell Atlantic) filed a motion for extension of time in the Special Access Expanded Interconnection investigation.[6] The GTE Service Corporation (GTE) also filed a motion for extension of time in this investigation on July 29, 1993, and US West Communications, Inc. (US West) filed a motion on August 2, 1993. The petitioners contend that the three weeks provided for preparing direct cases in this investigation is not adequate to provide all the information requested in the *Designation Order*, especially in light of filings scheduled in other proceedings.[7] Bell Atlantic also considers it unreasonable to allow less time to prepare direct cases than is allowed for oppositions to the direct cases.[8] US West claims that it needs extra time to convert its data to Lotus 1-2-3 format.[9] We conclude that the petitioners have shown good cause for granting some extension of time in this proceeding but not for the entire time period requested. Accordingly, parties in the Special Access Expanded Interconnection Investigation are required to submit their direct cases on or before August 20, 1993. Oppositions to direct cases are due September 20, 1993, and replies are due September 30, 1993.

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[1] *800 Data Base Access Tariffs and the 800 Service Management System Tariff, Order Designating Issues for Investigation*, CC Docket 93-129, DA 93-930 (released July 19, 1993) (*Designation Order*).

[2] Investigation of Special Access Tariffs of Local Exchange Carriers, CC Docket No. 85-166, Phase II part 1 and Phase III Part 1, FCC 93-337 (released July 12, 1993) (*OCC Discount Remand Order*).

[3] Southwestern Bell Motion at 2.

[4] *Id.*

[5] *Id.*

[6] Local Exchange Carriers' Rates, Terms, and Conditions for Expanded Interconnection for Special Access, CC Docket No. 93-162, DA 93-951 (released July 23, 1993) (*Designation Order*).

[7] Bell Atlantic Motion at 2-3; GTE Motion at 1-2; US West Motion at 1-3.

[8] Bell Atlantic Motion at 2.

[9] US West Motion at 3.

4. Therefore, IT IS ORDERED that the motion filed by Pacific Bell and Nevada Bell to extend the deadlines for all parties to file direct cases, oppositions and replies in the 800 data base proceeding IS GRANTED, to the extent specified above.

5. IT IS FURTHER ORDERED that the motion filed by Southwestern Bell Telephone Company to extend the deadlines for all parties to file reports, oppositions and replies required by the *OCC Discount Remand Order* IS GRANTED, to the extent specified above.

6. IT IS FURTHER ORDERED that the motions for extension of time in the Expanded Interconnection investigation filed by Bell Atlantic Telephone Company, GTE Service Corporation, and US West Communications, Inc., ARE GRANTED, to the extent specified above.

FEDERAL COMMUNICATIONS COMMISSION

Gregory J. Vogt
Chief, Tariff Division
Common Carrier Bureau

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

1993 Annual Access Tariff Filings — **CC Docket No. 93-193**

National Exchange Carrier Association Universal Service Fund and Life Line Assistance Rates — Transmittal No. 556, **CC Docket No. 93-123**

GSF Order Compliance Filings

Bell Operating Companies' Tariff for the 800 Service Management System and 800 Data Base Access Tariffs — **CC Docket No. 93-129**

MCI Telecommunications Corporation
Motion for Extension of Time

ORDER

Adopted: August 4, 1993; Released: August 5, 1993

By the Chief, Tariff Division, Common Carrier Bureau:

1. On July 30, 1993, MCI Telecommunications Corporation (MCI) filed a motion requesting extension, until September 7, 1993, of the deadline for filing responses to the direct cases in the above-captioned proceeding.[1] Those responses are otherwise due on August 10, 1993.

2. MCI states that 31 local exchange carriers (LECs) submitted direct cases responding to the *1993 Annual Access Order*. Most of the filings, MCI asserts, contained more than 50 pages. MCI asserts that the Bureau asked LECs to provide new information on the subject of post-retirement benefits, and provided the LECs more than a month to submit their data. Accordingly, MCI argues that the allotted time of 14 days for replies does not permit interested parties sufficient time to respond adequately to the direct cases.[2]

3. We have reviewed MCI's motion. It is the policy of the Commission that motions for extension of time shall not be routinely granted.[3] However, we conclude that the public interest would be served by granting at least part of the extension of time requested by MCI in which to respond to the direct cases. We also conclude that other interested parties should be granted this same extension.

4. Therefore, interested parties may file pleadings responding to the direct cases no later than **August 24, 1993**. The local exchange carriers may file rebuttals no later than **September 10, 1993**.

FEDERAL COMMUNICATIONS COMMISSION

Gregory J. Vogt
Chief, Tariff Division
Common Carrier Bureau

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[1] 1993 Annual Access Tariff Filings, CC Docket No. 93-193, DA 93-762 (released Jn.23, 1993)(*1993 Annual Access Order*).
[2] MCI Motion for Extension of Time to Respond at 2.
[3] *See* Section 1.46(a) of the Commission's rules, 47 C.F.R. § 1.46(a).

Before the
Federal Communications Commission
Washington, D.C. 20554

CC Docket No. 91-141

In the Matter of

Expanded Interconnection with
Local Telephone Company Facilities

Petitions for Exemption from
Physical Collocation Requirement
for Central Offices Located in
Maryland

MEMORANDUM OPINION AND ORDER

Adopted: August 4, 1993; Released: August 6, 1993

By the Acting Chief, Common Carrier Bureau:

1. In the *Expanded Interconnection Order,* the Commission adopted rules requiring local exchange carriers (LECs) to offer physical collocation to competitive access providers (CAPs).[1] The Commission also stated in the *Expanded Interconnection Order* that it would consider exempting LECs from the physical collocation requirement based on a formal decision by a state legislature or public utility regulatory agency favoring virtual collocation rather than physical for intrastate collocation, or allowing LECs to choose what form of interconnection to use for intrastate expanded interconnection.[2]

2. In the *Exemption Order,* the Common Carrier Bureau (Bureau) considered petitions for exemption from the Commission's physical collocation requirement under delegated authority.[3] In particular, the Bell Atlantic Telephone Companies (Bell Atlantic) petitioned for exemption based on a decision of the Maryland Public Service Commission (Maryland PSC).[4] The Maryland PSC adopted an order allowing LECs to choose the form of interconnection to use for intrastate expanded interconnection, to help ensure that LECs in Maryland have adequate space in their central offices to provide local service in the future.[5] Maryland did not expressly state whether it was permitting or requiring collocation, but observed that Bell Atlantic offers physical collocation under tariff at the majority of its central offices.[6] The Maryland PSC also stated it would "entertain any complaint filed by an intrastate interconnector that the LEC unreasonably denied its request for physical collocation."[7]

3. We requested that the Maryland PSC provide us with further information to assist us in determining whether its expanded interconnection policy currently requires LECs to provide intrastate expanded interconnection to interconnectors.[8] The Maryland PSC responded on July 1, 1993. The Maryland PSC states that its Order requires Bell Atlantic to provide intrastate special access expanded interconnection where so requested.[9] The Maryland PSC explains that, in light of Bell Atlantic's previous commitment to provide intrastate special access expanded interconnection upon bona fide request, it found it was unnecessary to explicitly require interconnection in its Order. However, the Maryland PSC adds that "Tier I LECs in Maryland are currently required to provide intrastate expanded interconnection to interconnectors."[10] This is consistent with the Maryland PSC's statement in its Order that Bell Atlantic offers physical collocation under tariff at the majority of its central offices, and that the Maryland PSC would "entertain any complaint filed by an intrastate interconnector that the LEC unreasonably denied its request for physical collocation."[11] Based on the Maryland PSC's clarification, we conclude that Maryland's expanded interconnection policy provides LECs a sufficient basis for exemption from the Commission's physical collocation requirement.[12]

4. Accordingly, IT IS ORDERED that the petition for exemption from the Commission's physical collocation requirement filed by Bell Atlantic Telephone Companies IS GRANTED for its central offices in Maryland.

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[1] Expanded Interconnection with Local Telephone Company Facilities, CC Docket No. 91-141, 7 FCC Rcd 7369 (1992) (*Expanded Interconnection Order).*

[2] *Expanded Interconnection Order,* 7 FCC Rcd at 7390-91 (para. 41). The Commission determined that such state policies must be adopted in final decisions which permit interested parties a reasonable opportunity to be heard. Finally, the Commission required petitions for exemption to be submitted by the date for filing expanded interconnection tariffs, which was February 16, 1993. *Id.*

[3] Expanded Interconnection with Local Telephone Company Facilities, Petitions for Exemption from Physical Collocation Requirement, CC Docket No. 91-141, DA 93-658, released June 9, 1993 (*Exemption Order).*

[4] *See Exemption Order* at para. 44.

[5] In the Matter of the Petition of the Chesapeake and Potomac Telephone Company of Maryland for Commission Adoption of a Formal Decision in Favor of Allowing Local Exchange Carriers to Choose the Form of Interconnection to Use for Intrastate Expanded Interconnection, Maryland PSC, Order No. 70357, Case No. 8533, at 4-5 (adopted Feb. 11, 1993).

[6] *Id.* at 4.

[7] *Id.* at 5.

[8] *Exemption Order,* para. 46.

[9] Letter from Chairman Frank O. Heintz, Commissioner Lilo K. Schifter, Commissioner Claude M. Ligon, Commissioner E. Mason Hendrickson, and Commissioner Susanne Brogan, Maryland PSC to Kathleen B. Levitz, Acting Chief, Common Carrier Bureau (July 1, 1993).

[10] *Id.* at 1.

[11] In the Matter of the Petition of the Chesapeake and Potomac Telephone Company of Maryland for Commission Adoption of a Formal Decision in Favor of Allowing Local Exchange Carriers to Choose the Form of Interconnection to Use for Intrastate Expanded Interconnection, Maryland PSC, Order No. 70357, Case No. 8533, at 4-5 (adopted Feb. 11, 1993). *See Exemption Order,* para. 44.

[12] However, if Maryland's decision is overturned on appeal, or is revised on reconsideration, we may reconsider our decision to grant Bell Atlantic's petition for exemption based on this decision.

FEDERAL COMMUNICATIONS COMMISSION

Kathleen B. Levitz
Acting Chief
Common Carrier Bureau

Before the
Federal Communications Commission
Washington, D.C. 20554

PUBLIC NOTICE

Released: August 9, 1993

PLEADING CYCLE ESTABLISHED FOR COMMENTS ON GUAM TELEPHONE AUTHORITY'S AND COLUMBIA COMMUNICATIONS CORPORATION'S PETITIONS REGARDING EQUAL ACCESS ON GUAM

On July 29, 1993, Guam Telephone Authority (GTA) filed a petition requesting that the Commission issue a declaratory ruling specifying the equal access protocol for Guam. GTA also requests that, if appropriate, the Commission issue a declaratory ruling that implementation of Feature Group D (FGD) on Guam is not a violation of the Communications Act or any Commission Order or directive. GTA states that the GTA Board has approved a delay of 45 days in GTA's implementation of FGD to allow the Commission to act on this Petition.

On July 30, 1993, Columbia Communications Corporation (Columbia) filed a petition requesting that the Commission order the immediate suspension of GTA's conversion to Feature Group D (FGD).

Interested parties are to file comments on this petition by **August 27, 1993**, and reply comments by **September 7, 1993**, with the Secretary, FCC 1919 M Street, N.W., Washington, D.C. 20554. A copy should also be sent to Peggy Reitzel, Common Carrier Bureau, FCC, Room 544, 1919 M Street, N.W., Washington, D.C. 20554, and to the Commission's contractor for public service records duplication: ITS, Inc., 2100 M Street, N.W., Suite 140, Washington, D.C. 20037. Copies of the petition can be obtained from ITS, Inc. at (202) 857-3800.

We will treat this proceeding as non-restricted for purposes of the Commission's *ex parte* rules. *See generally*, 47 C.F.R. §§1.1200-1.1216. For further information contact Peggy Reitzel, Policy and Program Planning Division of the Commission Carrier Bureau, at (202) 632-1300.

FEDERAL COMMUNICATIONS COMMISSION

Before the
Federal Communications Commission
Washington, D.C. 20554

PUBLIC NOTICE

Released: August 4, 1993

US WEST, NEMONT, PROJECT AND VALLEY TELEPHONE FILE JOINT PETITION FOR WAIVER OF STUDY AREA DEFINITION (PART 36 APPENDIX-GLOSSARY) AND PRICE CAP "ALL OR NOTHING" RULE (SECTION 61.41(c) AAD 93-87)

Comment date: September 7, 1993
Reply date: September 28, 1993

On July 23, 1993, US West Communications, Inc. (US West), Nemont Telephone Cooperative, Inc. (Nemont), Project Telephone Company (Project) and Valley Telecommunications, Inc. (Valley) filed a joint petition for waiver of the definition of "study area" as set forth in the Appendix-Glossary of Part 36 of the Commission's rules. This waiver would allow the parties to reflect the changes in their study area boundaries that would result from the sale from US West to Nemont and its wholly-owned subsidiaries Project and Valley Range of 20 rural exchanges in northeastern and south central Montana. Nemont and Project would add purchased exchanges to their existing Montana study areas; Valley would establish a new Montana study area. Nemont, Project and Valley also seek a waiver of the price cap rules at Sections 61.41(c) and (d) and, if needed, 69.3(e)(11), to exempt them from the price cap "all or nothing" rule and to allow Valley to operate as a cost company in the NECA common line and traffic sensitive pools. The parties state that this transaction is currently pending before the Montana Public Service Commission.

Parties may file comments on this petition no later than **September 7, 1993.** Replies should be filed by **September 28, 1993.** Comments should reference AAD 93-87. A copy of each pleading should be sent to Jacqueline Spindler, Common Carrier Bureau, 2000 L Street, N.W., Room 812, Washington, D.C. 20554, and to International Transcription Service (ITS), 2100 M Street, N.W., Suite 140, Washington, D.C. 20037, (202) 857-3800. Copies are available for public inspection and copying in the Accounting and Audits Division's public reference room, 2000 L Street, N.W., Room 812, Washington D.C.; copies are also available from ITS.

For further information contact Jacky Spindler at (202) 634-1861.

FEDERAL COMMUNICATIONS COMMISSION

Before the
Federal Communications Commission
Washington, D.C. 20554

PUBLIC NOTICE

Released: August 4, 1993

US WEST, BLACKFOOT, AND CLARK FORK FILE JOINT PETITION FOR WAIVER OF STUDY AREA DEFINITION (PART 36 APPENDIX-GLOSSARY) AND PRICE CAP "ALL OR NOTHING" RULE (SECTION 61.41(c) AAD 93-88)

Comment date: September 7, 1993
Reply date: September 28, 1993

On July 23, 1993, US West Communications, Inc. (US West), Blackfoot Telephone Cooperative, Inc. (Blackfoot) and Clark Fork Telecommunications, Inc. (Clark Fork) filed a joint petition for waiver of the definition of "study area" as set forth in the Appendix-Glossary of Part 36 of the Commission's rules. This waiver would allow the parties to reflect the changes in their study area boundaries that would result from the sale from US West to Blackfoot and its wholly-owned subsidiary Clark Fork of nine rural exchanges in western Montana. Blackfoot and Clark Fork also seek a waiver of the price cap rules at Sections 61.41(c) and (d) and, if needed, 69.3(e)(11), to exempt them from the price cap "all or nothing" rule and to allow Clark Fork to participate as a cost company in the NECA common line and traffic sensitive pools. The parties state that this transaction is currently pending before the Montana Public Service Commission.

Parties may file comments on this petition no later than **September 7, 1993.** Replies should be filed by **September 28, 1993.** Comments should reference AAD 93-88. A copy of each pleading should be sent to Jacqueline Spindler, Common Carrier Bureau, 2000 L Street, N.W., Room 812, Washington, D.C. 20554, and to International Transcription Service (ITS), 2100 M Street, N.W., Suite 140, Washington, D.C. 20037, (202) 857-3800. Copies are available for public inspection and copying in the Accounting and Audits Division's public reference room, 2000 L Street, N.W., Room 812, Washington D.C.; copies are also available from ITS.

For further information contact Jacky Spindler at (202) 634-1861.

FEDERAL COMMUNICATIONS COMMISSION

Before the
Federal Communications Commission
Washington, D.C. 20554

PUBLIC NOTICE

Released: August 4, 1993

GTE SOUTHWEST INCORPORATED AND EAGLENET, INC. TELEPHONE FILE JOINT PETITION FOR WAIVER OF STUDY AREA DEFINITION (PART 36 APPENDIX-GLOSSARY); EAGLENET PETITIONS FOR WAIVER OF PRICE CAP RULE SECTION 61.41(c)
AAD 93-94

Comment date: September 7, 1993
Reply date: September 28, 1993

On July 27, 1993, GTE Southwest Incorporated (GTE) and EagleNet, Inc. (EagleNet) filed a joint petition for waiver of the definition of "study area" as set forth in the Appendix-Glossary of Part 36 of the Commission's rules. This waiver would allow the parties to reflect the changes in their study area boundaries that would result from the sale from GTE to EagleNet of fourteen exchanges in western Oklahoma. EagleNet also seeks a waiver of the price cap rules at Sections 61.41(c) and (d) and, if needed, 69.3(e)(11), to exempt it from the price cap "all or nothing" rule and allow it to continue to operate as a cost company in the NECA common line and traffic sensitive pools. The parties state that this transaction is currently pending before the state commissions of Oklahoma and Texas.

Parties may file comments on this petition no later than **September 7, 1993.** Replies should be filed by **September 28, 1993.** Comments should reference AAD 93-94. A copy of each pleading should be sent to Jacqueline Spindler, Common Carrier Bureau, 2000 L Street, N.W., Room 812, Washington, D.C. 20554, and to International Transcription Service (ITS), 2100 M Street, N.W., Suite 140, Washington, D.C. 20037, (202) 857-3800. Copies are available for public inspection and copying in the Accounting and Audits Division's public reference room, 2000 L Street, N.W., Room 812, Washington D.C.; copies are also available from ITS.

For further information contact Jacky Spindler at (202) 634-1861.

FEDERAL COMMUNICATIONS COMMISSION

Before the
Federal Communications Commission
Washington, D.C. 20554

PUBLIC NOTICE

Released: August 3, 1993

CONSUMER ALERT

TOLL FRAUD
IMPERSONATORS OF INVESTIGATIVE OFFICERS

Fifth in a Series

The FCC has received reports that consumers and businesses have received calls from people claiming to be FCC inspectors or representatives of local or long distance telephone companies investigating calls placed from consumer or business telephone numbers to other states or countries. In some cases, the caller has given a false FCC badge or inspector number and may provide the called party with a series of false operator identification numbers. The object of these calls and visits is to trick unsuspecting consumers into accepting charges for fraudulent telephone calls which ultimately will be billed to the unsuspecting consumer.

Typically, the caller will advise the consumer that records show that calls have been charged to the consumer's line and that the FCC or the telephone company wants to check to see if there is something wrong with the consumer's telephone line or equipment. The caller may claim that a named individual is under investigation and that the consumer's assistance is needed to catch this person. The consumer is then advised that the caller's supervisor will call, usually within a specific time period, and that the consumer should just say "yes" when asked to accept charges for that call. If the consumer says "yes," the consumer unknowingly authorizes the use of his or her number to be billed for a collect or third-number call that someone else placed to another state or to another country. It appears that some of the follow-up calls may be placed through a legitimate long distance telephone company operator who unknowingly becomes part of the fraudulent scheme.

HOW DO I KNOW WHEN TO SUSPECT THAT A CALL IS FRAUDULENT?

First, neither FCC nor telephone company personnel would request that you accept charges for any call placed by a company supervisor, or to just answer "yes" in response to a request to accept follow-up telephone calls. Also, keep in mind that no testing or other checks performed by a telephone company would involve acceptance of collect or third-number billed calls. Similarly, neither FCC nor telephone company personnel would ask for your name, address, and telephone number, or the identity of any friends or relatives. Any questions along these lines, or any questions asking for personal information such as your credit card numbers or telephone company calling card numbers, should signal to you that the call may not be legitimate.

DO TELEPHONE COMPANY REPRESENTATIVES EVER CALL CONSUMERS TO DISCUSS CALLS APPEARING TO BE FRAUDULENT?

Yes. Telephone company representatives call consumers, for example, when unusually high usage appears on the consumer's telephone record. However, you should ask the caller for proper identification before discussing any personal information. And, bear in mind that most, if not all, information about your account is on record so that questions of a personal nature should be suspect.

WHAT SHOULD I DO IF I SUSPECT THAT A CALL IS NOT LEGITIMATE OR THAT IT IS A FRAUD ATTEMPT?

If you believe that the call may not be legitimate, immediately ask the caller for his or her name, the company for whom he or she works and the alleged problem. Tell the caller that you intend to call the company yourself to verify that the call is legitimate. Immediately hang up and call your local telephone company to determine whether or not a problem exists with your telephone line or telephone bill. If the caller claimed to work for a long distance company, your local telephone company also should be able to give you a telephone number for the long distance company so that you can call the company yourself to verify that a problem exists.

WHAT OTHER STEPS SHOULD I TAKE TO HELP PREVENT TELEPHONE TOLL FRAUD?

You should not, under any circumstance, give out your name, address or credit card numbers; names and locations of friends or relatives living here or abroad; or accept collect or third number-billed calls unless you are absolutely certain of the caller's identity and purpose.

WHAT IMPACT COULD TOLL FRAUD HAVE ON ME AND MY TELEPHONE BILL?

You can incur very high charges on your telephone bill since toll fraud commonly involves very lengthy calls to foreign countries. It could also mean that you and the local or long distance telephone company would need to spend substantial time and effort to correct problems associated with the fraudulent calls.

WHO CAN I CONTACT FOR ADDITIONAL INFORMATION OR TO REPORT PROBLEMS OR COMPLAINTS?

You can contact your local telephone company, the long distance company identified in a call, or local or federal law enforcement agencies.

WHAT SHOULD I DO IF I RECEIVE A TELEPHONE BILL FOR FRAUDULENT INTERSTATE OR INTERNATIONAL CALLS?

You should first call your local telephone company, if the billing page was included with your local telephone bill, or the long distance carrier identified on the billing page. If you are unsuccessful in your attempts to resolve the complaint yourself, you can file a complaint with the FCC. A copy of the telephone bill or bills listing the disputed charges should be included with the complaint. There is no special form to fill out. You can simply write a letter in your own words to:

Informal Complaints and Public
Inquiries Branch
Enforcement Division, Common Carrier Bureau
Federal Communications Commission
2025 M Street, N.W. - Stop Code 1600A2
Washington, D.C. 20554

FEDERAL COMMUNICATIONS COMMISSION

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

COMPETITIVE TELECOMMUNICATIONS ASSOCIATION, *et al.*,
Complainants,

v.

THE CHESAPEAKE AND POTOMAC TELEPHONE COMPANIES,	File No. E-89-382
NEW JERSEY BELL TELEPHONE COMPANY,	File No. E-89-383
MICHIGAN BELL TELEPHONE COMPANY,	File No. E-89-384
WISCONSIN BELL, INC.,	File No. E-89-385
MOUNTAIN STATES TELEPHONE AND TELEGRAPH COMPANY,	File No. E-89-386
NORTHWESTERN BELL TELEPHONE COMPANY,	File No. E-89-387
PACIFIC NORTHWEST BELL TELEPHONE COMPANY,	File No. E-89-388
PACIFIC BELL TELEPHONE COMPANY, and	File No. E-89-389
SOUTHWESTERN BELL TELEPHONE COMPANY,	File No. E-89-390

Defendants,

and

In the Matter of

ADVANCED TELECOMMUNICATIONS CORPORATION and ITS SUBSIDIARIES,
Complainants,

v.

MICHIGAN BELL TELEPHONE COMPANY,	File No. E-90-355
WISCONSIN BELL, INC., and	File No. E-90-356
MOUNTAIN STATES TELEPHONE AND TELEGRAPH COMPANY,	File No. E-90-361

Defendants,

and

In the Matter of

MIDAMERICAN LONG DISTANCE COMPANY,
Complainant,

v.

PACIFIC BELL TELEPHONE COMPANY,	File No. E-89-406
MOUNTAIN STATES TELEPHONE AND TELEGRAPH COMPANY, and	File No. E-89-407
NORTHWESTERN BELL TELEPHONE COMPANY,	File No. E-89-408

Defendants.

MEMORANDUM OPINION AND ORDER

Adopted: July 1, 1993; **Released: July 30, 1993**

By the Commission:

I. INTRODUCTION

1. We have before us petitions filed by complainants and by several local exchange carrier defendants seeking reconsideration[1] and clarification[2] of our actions in *Competitive Telecommunications Association v. The Chesapeake and Potomac Telephone Companies*[3] and *MidAmerican Long Distance Company v. Pacific Bell Telephone Company*[4] (collectively *"Damages Orders"*). In the *Damages Orders*, we held that the complainants had met their burden of establishing that the defendants had violated the Communications Act (the "Act") by earning in excess of the Commission's prescribed rate of return in one or more access service categories for the period October 1, 1985

[1] Competitive Telecommunications Association (CompTel) filed a petition for reconsideration on behalf of its member companies. Michigan Bell Telephone Company (Michigan Bell), Wisconsin Bell, Inc., (Wisconsin Bell) (collectively "Ameritech"), The Mountain States Telephone and Telegraph Company (MTN), Northwestern Bell Telephone Company (NWB), Pacific Northwest Bell Telephone Company (PNB) (collectively "U S West"), Pacific Bell Telephone Company (Pacific Bell), and Southwestern Bell Telephone Company (SWBT) all opposed the petition. The Chesapeake and Potomac Telephone Companies (C&P) and New Jersey Bell Telephone Company (NJB) (collectively "Bell Atlantic") filed a petition for partial reconsideration seeking a modification of the Commission's damages determinations in File Nos. E-89-382 and E-89-383. SWBT also filed a petition for reconsideration with respect to File No. E-89-390. CompTel filed oppositions to these petitions along with motions for leave to file out of time. Because the petitioners will not be prejudiced by CompTel's late filing, we will grant CompTel's motion.

[2] Advanced Telecommunications Corporation and its subsidiaries (ATC) and MidAmerican Long Distance Company (MidAmerican) both filed petitions for clarification concerning the methodology to be used in computing interest on damages awards. Michigan Bell, Wisconsin Bell, MTN, NWB, and Pacific Bell all filed oppositions to the petitions for clarification to which petitioners have replied. In addition, CompTel included in its petition for reconsideration a request for clarification of the interest computation methodology.

[3] 8 FCC Rcd 1224 (1993) (*CompTel Damages Order*).

[4] 8 FCC Rcd 1201 (1993) (*MidAmerican Damages Order*).

through December 31, 1986.[5] We further held that the complainants are entitled to recover monetary damages from defendants to the extent they could establish that they suffered actual damage as a consequence of the defendants' violations.[6]

2. In addressing the complainants' claims for damages, we found it appropriate to look in the first instance at the difference between the amount the complainants actually paid for defendants' access services during the relevant period and the amount they would have paid if the defendants' rates had produced earnings within the prescribed levels.[7] We concluded, however, that it is proper for defendants to offset the complainants' damages claims with evidence showing that the complainants benefitted by purchasing other access services from defendants during the relevant period at rates that produced earnings below the Commission's prescribed levels.[8] Thus, defendants were permitted to offset damages claims by showing that the complainants underpaid, in effect, for other access services purchased from defendants during the same period.[9] We also held that complainants are entitled to prejudgment interest on their damage awards computed at the Internal Revenue Service (IRS) interest rate.[10]

II. PETITIONS FOR RECONSIDERATION

A. Contentions of the Parties

3. In seeking reconsideration, the petitioners raise arguments that, with the exception of those discussed in paragraphs 11 and 12 below, were previously considered at length and rejected by the Commission.[11]

1. CompTel's Petition

4. In its petition, CompTel contends that the Commission applied the wrong legal standard in addressing its damages claims. According to CompTel, black letter law dictates that where a complainant has established that a carrier's rates were unjust and unreasonable under Section 201(b) of the Act,[12] the measure of damages is exactly the difference between the rate paid and the rate that would have been paid had the charges been just and reasonable.[13] CompTel contends, in effect, that the Commission is bound to apply this standard to CompTel's damages claims without reference to whether it incurred actual damages and that the allowance of offsets violates this standard.[14]

5. CompTel raises several arguments to support its contention that the Commission erred in allowing offsets against its damages claims. As a threshold matter, CompTel contends that the Commission lacks the authority to reduce a complainant's damages based on equitable or public interest considerations.[15] CompTel argues that even if such authority exists, equitable and public interest considerations do not support a reduction in CompTel's damages in the instant case. To find otherwise, CompTel contends, would allow the defendants to cross-subsidize their rates and would shift the risk that a carrier will violate rate of return prescriptions from the carrier to the carrier's customers.[16] CompTel further contends that offsets are improper because the Commission lacks the authority to consider a carrier's complaint or counterclaim against a customer/complainant.[17] Finally, CompTel argues that allowing offsets violates the filed rate doctrine and permits the defendants to retroactively raise rates.[18]

6. In opposition, all of the respondents contend that the legal authority cited by CompTel to support the measure of damages it advocates is inapplicable in a Section 208 proceeding alleging a rate of return violation.[19] Several respondents argue further that CompTel's claim that offsets are improper for equitable and policy reasons is without merit. These respondents contend that CompTel has offered no evidence that they targeted their rates to cross-subsidize or discriminate in violation of Section 202 of the Act.[20] Ameritech argues further that the Commission has the right to consider equities and that the equities of the situation support the awarding of offsets.[21] As for CompTel's argument that the Commission has no jurisdiction to consider a carrier's counterclaims against its customer, U S West agrees and contends further that the amount of CompTel's damages must be decided in a district court proceeding under Section 407 of the Act[22] in which U S West may properly pursue a counterclaim. Finally, SWBT

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[5] *See, e.g., CompTel Damages Order,* 8 FCC Rcd at 1224, para. 1 (citing 47 U.S.C. § 201(b) (1988)).

[6] *CompTel Damages Order,* 8 FCC Rcd at 1224, para. 1.

[7] *Id.* at 1229, para. 18.

[8] *Id.* at 1232, para. 35. Applying these standards, we awarded the CompTel complainants damages, exclusive of interest, as follows: $10,185 from C&P, $146,371 from NJB, $2,870 from Michigan Bell, $67,590 from Wisconsin Bell, $188,106 from MTN, $15,351 from NWB, $256,045 from PNB, $102,573 from Pacific Bell, and $604 from SWBT.

[9] *Id.*

[10] *Id.* at 1232-33, para. 38.

[11] *See, e.g.,* MCI Telecommunications Corporation v. Pacific Northwest Bell Telephone Co., 5 FCC Rcd 216 (1990), *recon. denied,* 5 FCC Rcd 3463 (1990), *appeal dismissed sub nom. Mountain States Tel. and Tel. Co., v. FCC,* 951 F.2d 1259 (10th Cir. 1991) (per curiam) and MCI Telecommunications Corporation v. Pacific Bell Telephone Company, 8 FCC Rcd 1517 (1993) (*MCI Damages Order*) (collectively "*MCI Orders*").

[12] 47 U.S.C. § 201(b) (1988).

[13] CompTel Petition for Reconsideration, File Nos. E-89-382-390 (CompTel Petition) at 4-5 (citing *Louisville & Nashville R. Co. v. Sloss-Sheffield Steel & Iron Co.,* 269 U.S. 217, 235 (1925) (*Sloss-Sheffield*); *Southern Pac. Co., v. Darnell-Taenzer Lumber Co.,* 245 U.S. 531 (1918) (*Darnell-Taenzer*); Hughes Sports Network, 34 FCC 2d 691, 693 (1972) (*Hughes Sports*)).

[14] *See* CompTel Petition at 5-6. CompTel contends that consideration of actual damages is appropriate where a violation of the prohibition against unreasonable discrimination under Section 202(a) of the Act, 47 U.S.C. § 202(a) (1988), is found.

[15] CompTel Petition at 7-9.

[16] *Id.* at 9-11.

[17] *Id.* at 11-13 (citing Illinois Bell Tel. Co. v. AT&T, 4 FCC Rcd 5268, 5270 (1989) and Thornell Barnes Co. v. Illinois Bell Tel. Co., 1 FCC 2d 1247, 1275 (1965)).

[18] CompTel Petition at 12.

[19] *See, e.g.,* Ameritech Opposition to CompTel's Petition for Reconsideration, File Nos. E-89-384-385 (Ameritech/CompTel Opposition) at 2-3.

[20] 47 U.S.C. § 202 (1988). *See, e.g.,* U S West Opposition to Petition for Reconsideration, File Nos. E-89-386-388 (U S West/CompTel Opposition) at 4-5.

[21] Ameritech/CompTel Opposition at 3.

[22] *See* U S West/CompTel Opposition at 5-6 (citing 47 U.S.C. § 407 (1988)). Section 407 states in pertinent part

opposes CompTel's Petition with the general arguments that CompTel failed to allege a cause of action under the Act and that the statute of limitations bars the complaint.[23]

2. Bell Atlantic's Petition

7. Bell Atlantic's petition for partial reconsideration requests that the Commission review its damages calculations to consider offsets that Bell Atlantic claims the Commission failed to consider in computing damages for ITT Communications Service, Inc. (ITT), one of CompTel's member companies. Bell Atlantic argues that the Commission erred in concluding that Bell Atlantic had failed to submit evidence of offsets against ITT's damages claims.[24] Bell Atlantic states that ITT is a subsidiary of Metromedia Long Distance, Inc. (Metromedia), also a party to the complaint. Therefore, Bell Atlantic contends, the offset calculations it submitted with respect to Metromedia properly encompass ITT's damages claims as well. Bell Atlantic argues that applying these offsets, the damages awarded Metromedia and its subsidiary ITT should be reduced from $131,864 to $108,470.

8. In opposition, CompTel argues that ITT and Metromedia were separate entities when it filed its complaint and that the complaint included separate damages requests for ITT and Metromedia. CompTel points out that Bell Atlantic failed to specifically address these separate claims with offsetting evidence and provided no information in the record that would provide a basis for determining whether and to what extent ITT's damages should be offset.[25]

3. SWBT's Petition

9. In its petition, SWBT raises four principal arguments, all of which we considered at length in the *CompTel Damages Order*. SWBT reiterates its contentions that complainants failed to establish a prima facie case for damages,[26] that computing overearnings on a customer-specific, access category basis is simply a means of reestablishing the automatic refund rule invalidated by *AT&T v. FCC*,[27] that CompTel's claims are barred by the statute of limitations contained in Section 415 of the Act,[28] and that the Commission has no authority to award interest in a formal complaint proceeding.[29] CompTel generally opposes SWBT's petition on the grounds that SWBT's arguments have previously been considered and rejected by the Commission.[30]

B. Discussion

10. After a full review, we are not persuaded to disturb the result or underlying rationale of the *CompTel Damages Order*. Reconsideration generally is not available for purposes of rearguing matters on which there has been deliberation and decision.[31] With two minor exceptions, the record here consists of arguments that already have been considered at length and resolved in the *CompTel Damages Order* and in the *MCI Orders*. We turn now to those exceptions.

11. First, CompTel argues that the Commission applied an incorrect legal standard in addressing complainants' damages claims. We find no merit in CompTel's contention that the Commission is bound by law to award damages in these proceedings based solely on the difference between the defendants' rates that produced the excessive earnings and rates that would have produced earnings within the prescribed levels.[32] We pointed out in the *MCI Damages Order* and the *CompTel Damages Order* that the issue presented in these proceedings is the extent to which the complainants incurred actual damage as a consequence of defendants' violations of a binding rate of return prescription.[33] The focus of CompTel's complaints is not defendants' individual rates *per se*, but the excessive earnings produced by these rates and their effect on the CompTel complainants.[34] It is, therefore, entirely reasonable to examine the sum of a complainant's purchases of interstate access services from defendants during the period in question to determine whether the complainant suffered any measurable damages that can be attributed to defendants' excessive earnings levels.[35] CompTel has presented no evidence or arguments on review that would persuade us to alter this ruling.[36]

> If a carrier does not comply with an order for the payment of money within the time limit in such order, the complainant . . . may file in the district court of the United States . . .a petition setting forth briefly the causes for which he claims damages, and the order of the Commission in the premises. Such suit in the district court of the United States shall proceed in all respects like other civil suits for damages, except that on the trial of such suits the findings and order of the Commission shall be prima facie evidence of the facts therein stated . . .

47 U.S.C. § 407 (1988).

[23] Opposition of Southwestern Bell Telephone Company, File No. E-89-390 (SWBT Opposition) at 3-8.

[24] Bell Atlantic Petition for Partial Reconsideration, File Nos. E-89-382-383 (Bell Atlantic Petition) at 2.

[25] CompTel Opposition to Petition for Reconsideration, File Nos. E-89-382-383 (CompTel/Bell Atlantic Opposition) at 2-4.

[26] SWBT Petition for Reconsideration, File No. E-89-390 (SWBT Petition) at 2-4.

[27] 836 F.2d 1386 (D.C. Cir. 1988). *See* SWBT Petition at 4-8.

[28] 47 U.S.C. § 415 (1988). *See* SWBT Petition at 8-10.

[29] SWBT Petition at 10-11.

[30] CompTel Opposition to Southwestern Bell Telephone Company Petition for Reconsideration, File No. E-89-390 (CompTel/SWBT Opposition) at 2.

[31] MCI Telecommunications Corporation v. Pacific Bell Telephone Company, 5 FCC Rcd 3463, 3463-64 (1990) (citing Empire State Cable TV Co., Inc., 10 FCC 2d 341, 342 (1967) and Petitions for Reconsideration of Commission Action, 77 FCC 2d 54 (1980)).

[32] CompTel's reliance upon *Sloss-Sheffield, Darnell-Taenzer,* and *Hughes Sports* for this proposition is unavailing. In none of these cases was the issue of the availability of offsets before the decision-maker. Nor is it clear that the availability of offsets could have been at issue, since there is no indication that the complainants made other offsetting purchases from the respective defendants during the same time period.

[33] *See, e.g., MCI Damages Order,* 8 FCC Rcd at 1527-28, para. 39.

[34] *See CompTel Damages Order,* 8 FCC Rcd at 1230, para. 24.

[35] *See MCI Damages Order,* 8 FCC Rcd at 1527-28, para. 39.

[36] Contrary to U S West's argument, we believe these matters are within our jurisdiction under Sections 206-209 of the Act.

12. Second, Bell Atlantic asserts that the Commission failed to consider offsets it presented with respect to ITT. Upon a thorough review of the record we find no persuasive support for Bell Atlantic's claim. In response to CompTel's interrogatories, Bell Atlantic submitted calculations for damages and offsets combining ITT and Metromedia. CompTel responded by submitting separate damage calculations for the two companies. CompTel and Bell Atlantic's calculations show a discrepancy in the amount of services ITT and Metromedia purchased from Bell Atlantic. Because the amounts billed were in dispute, CompTel filed an affidavit verifying the amounts submitted on behalf of Metromedia and ITT. Bell Atlantic did not oppose CompTel's supplement to the record, nor did it attempt in its petition for partial reconsideration to offer any calculations showing the specific amounts of services purchased by ITT and the offsets attributable to those purchases.[37] In the absence of persuasive evidence that would provide a basis for determining whether and to what extent Bell Atlantic is entitled to offsets against ITT's damages claims, we deny its petition for partial reconsideration.

III. PETITIONS FOR CLARIFICATION

A. Contentions of the Parties

13. In seeking clarification, petitioners request that the Commission specify whether the interest awarded on damages should be computed as simple or compound interest. The petitioners argue that since the interest payable to or by the United States under internal revenue law is compounded daily, the Commission, in choosing to use the IRS interest rate, has by implication also chosen to use compound rather than simple interest.[38] Petitioners also contend that compounding interest daily more closely comports with economic reality and with the Commission's desire to make the injured party whole and to prevent the defendants from being unjustly enriched.[39] The petitioners acknowledge that the Commission historically has awarded only simple interest in refund cases under Section 204 of the Act.[40] The petitioners argue, however, that the Commission has not specifically addressed the methodology of daily compounding interest. Petitioners point out that when the Commission initially adopted the IRS interest rate for its interest awards, the IRS rates were calculated on a simple basis. Petitioners contend that because the IRS changed its methodology to daily compounding interest in 1982, the Commission should similarly adopt this methodology.[41]

14. In opposition, all the respondents argue that the Commission awarded simple interest in *Teleprompter of Fairmont v. C&P of West Virginia*,[42] and since that decision provided support for the rationale behind an award of interest in this proceeding, only simple interest should be awarded here.[43] In addition, the parties claim that the Commission has historically only awarded simple interest and that petitioners have provided no compelling evidence for the Commission to depart from that precedent.[44] Ameritech also argues, without explanation, that "compounding the interest daily would give Comptel a greater effective tax rate than awarded by the Commission.[45] Both U S West and SWBT restate their arguments that the Commission has no authority to award interest.[46] Furthermore, U S West argues that the interest issue is not ripe for adjudication until a collection suit is brought by complainants under Section 407 of the Act.[47]

B. Discussion

15. The parties did not previously raise and we did not specifically address questions concerning the appropriate methodology to be used in computing interest on damages awards in common carrier complaint cases. The respondents correctly point out that the Commission has historically awarded simple interest in pole attachment proceedings under Section 224 of the Act and rate proceedings under Sections 204 and 205 of the Act. Respondents further point out that the Commission continued its practice of awarding simple interest in such cases notwithstanding the change in IRS policy in 1982. We note, however, that since the change in IRS methodology, the question of how interest should be computed in either refund or reparation cases has not been placed squarely before the Commission. After careful consideration, we conclude that adopting a general requirement that interest awarded in refund and reparation cases decided under the Act be computed on a daily compounded basis is appropriate. We are persuaded that daily compounded interest more closely reflects economic reality and more adequately compensates aggrieved parties for the value of money owed. Daily compounded interest will, therefore, better achieve the Act's goal of compensating parties who were deprived of the use of excessive charges paid and preventing the unjust enrichment of carriers who utilized funds to which they had no rightful claim. Daily compounded interest will also help to eliminate incentives carriers might otherwise have to delay resolution of cases against them.[48] Therefore, we reverse our previous practice of awarding simple interest as set out

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[37] Although Bell Atlantic contends that its offsets for ITT were combined with its calculations for Metromedia, we note that at the time the complaint was filed, ITT and Metromedia were separately listed as complainants. In the complaint, the companies listed separate addresses as well as separate states of incorporation and had no relationship apart from being co-complainants in this proceeding. We also note that separate calculations of the amount of service ITT and Metromedia took from Bell Atlantic would aid in resolving the dispute regarding amounts Bell Atlantic billed the two companies.

[38] *See, e.g.*, ATC Petition for Clarification (ATC Petition) at 6.

[39] *See, e.g.*, MidAmerican Petition for Clarification at 3.

[40] 47 U.S.C. § 204 (1988).

[41] *See, e.g.*, ATC Petition at 4-6.

[42] 79 FCC 2d 232 (1980) (*Teleprompter*).

[43] *See, e.g.*, Opposition of Pacific Bell to Petition for Clarification, File No. E-89-406 (Pacific/MidAmerican Opposition) at 2.

[44] *See id.* at 3.

[45] Ameritech/CompTel Opposition at 4-5.

[46] *See, e.g.*, U S West/CompTel Opposition at 6.

[47] 47 U.S.C. § 407 (1988). *See* U S West/CompTel Opposition at 7. U S West also contends that should an award of interest be upheld, the proper rate should be the rate used in civil proceedings. U S West Opposition to Petition for Clarification, File No. E-90-361 (U S West/ATC Opposition) at 3.

[48] We note that in adopting a daily compounded interest methodology for IRS use, Congress reasoned that simple interest failed to adequately compensate for the value of money owed and provided taxpayers incentives to delay resolution of tax controversies. *See* 1982 U.S. Code Cong. and Admin. News, p. 1047; Tax Equity & Fiscal Responsibility, P.L. 97-248, p. 305 (1982). We find this rationale to be equally applicable to refund and reparation cases decided under the Communications Act.

in *Teleprompter* and other prior decisions and adopt the general policy that interest awarded in proceedings under Sections 204, 205, 224 and 208 of the Act be awarded on a daily compounded basis.[49]

IV. ORDERING CLAUSES

16. Accordingly, IT IS ORDERED, pursuant to Section 4(i), 4(j), 201, 206-209, and 405 of the Communications Act of 1934, as amended, 47 U.S.C. §§ 154(i), 154(j), 201, 206-209, and 405, that the Petitions for Reconsideration filed by Competitive Telecommunications Association on March 24, 1993, by The Chesapeake and Potomac Telephone Companies and New Jersey Bell Telephone Company on March 25, 1993, and by Southwestern Bell Telephone Company on March 25, 1993 ARE DENIED.

17. IT IS FURTHER ORDERED that the Petitions for Clarification filed by MidAmerican Long Distance Company on March 3, 1993 and by Advanced Telecommunications Corporation and Its Subsidiaries on March 9, 1993 ARE GRANTED to the extent indicated here and otherwise ARE DENIED.

18. IT IS FURTHER ORDERED that the Motions for Leave to File Out of Time filed by Competitive Telecommunications Association on April 9, 1993 ARE GRANTED.

FEDERAL COMMUNICATIONS COMMISSION

William F. Caton
Acting Secretary

[49] In adopting this general policy, we do not foreclose the possibility that the unique circumstances of a particular case may warrant the application of simple rather than daily compounded interest.

Before the
Federal Communications Commission
Washington, D.C. 20554

In re Applications of

THE TRUSTEES OF INDIANA UNIVERSITY
Indianapolis, Indiana

File No. BMPLIF-900629DA

For Modification of the Authorized Instructional Television Fixed Service Facility of WHR-808 on Channels B1, B2, B3, and B4

INDIANA EDUCATIONAL BROADCAST CORPORATION
Trafalgar, Indiana

File No. BPLIF-901009DA

For Construction Permit and License in the Instructional Television Fixed Service on Channels B1, B2, B3, and B4

MEMORANDUM OPINION AND ORDER

Adopted: July 30, 1993; **Released: July 30, 1993**

By the Commission:

1. The Commission has before it for consideration an application filed by The Trustees of Indiana University (Indiana University) for a major modification of the facilities of unbuilt Instructional Television Fixed Service (ITFS) station WHR-808, which is authorized to operate on channels B1-B4 at Indianapolis, Indiana.[1] This application is mutually exclusive with the application filed by Indiana Educational Broadcast Corp. (IEBC), seeking a construction permit and license on ITFS channels B1-B4 at Trafalgar, Indiana. Each applicant filed petitions against the other, and responded with Oppositions and Replies.

BACKGROUND

2. Indiana University is the licensee of more than 20 ITFS stations throughout the state of Indiana, which are operated under the auspices of the Indiana Higher Education Telecommunication System (IHETS), a statewide telecommunications system. IHETS, composed of Indiana University and dozens of public and private colleges and universities in Indiana, is funded by a special appropriation from the state of Indiana. In 1967, the Indiana General Assembly designated Indiana University the fiscal agent for IHETS and, in 1977, authorized it to operate the IHETS network on behalf of the IHETS member schools. Indiana University is, therefore, the applicant for, and the permittee and licensee of, the numerous IHETS stations in Indiana.

3. In 1969, the Indiana University School of Medicine began operation on ITFS station WAT-21, channels E1 and E2 at Indianapolis, transmitting specialized programming produced by the School of Medicine to hospitals and clinics in Indianapolis. To meet increasing demands for medical and health-related instructional programming, the School of Medicine sought authority in 1983 to operate on channels E3 and E4. That request was denied on September 29, 1983, based on the Commission's then recently released *Report and Order in Gen. Docket No. 80-112 and CC Docket No. 80-116 (Report and Order)*, 94 F.C.C. 2d 1203, 1236 (1983), which reallocated the E and F channels to the Multipoint Distribution Service. Consequently, in 1984, Indiana University, in conjunction with IHETS, applied for channels B1-B4 in Indianapolis, stating that the School of Medicine would surrender the E channels upon commencement of operation on the B channels. On March 6, 1987, Indiana University was granted authorization to construct WHR-808 on the B channels at Indianapolis.

4. On June 29, 1990, Indiana University filed the modification application before us, proposing, among other things, to relocate the WHR-808 transmitter and to increase operating power to 50 watts in order to resolve potential interference with the modified facilities of station WBX-257, also an IHETS ITFS station, but transmitting general post-secondary, non-medical instructional programming on the A channels at Indianapolis. On October 9, 1990, IEBC filed an application for a new ITFS facility on channels B1-B4 at Trafalgar, Indiana, rendering Indiana University's major modification application for WHR-808 mutually exclusive with IEBC's application.

BASIC ELIGIBILITY

5. Before applying the mutually exclusive selection procedure to determine the number of merit points to be awarded to each applicant, we seek first to ascertain the basic eligibility of Indiana University and IEBC. Once that determination has been made and the comparative process employed, petitions to deny are considered only if filed against the tentative selectee.

6. Indiana University is an accredited university engaged in the formal education of enrolled students. It proposes to transmit courses on its campus and to area hospitals, including its own, for students enrolled in Indiana University's School of Medicine and Graduate School, as well as to off-campus sites for continuing education and teleconferencing purposes. Accordingly, Indiana University is a qualified ITFS applicant.

7. IEBC claims that it is a nonprofit organization whose purposes are educational and include providing educational and instructional television material to accredited institutions and governmental organizations. Of the 17 receive sites it proposes to serve, including accredited elementary schools, middle schools, high schools, and a college, 11 have submitted letters indicating a familiarity with IEBC's proposed program offerings and an intention to

[1] Indiana University's proposed modifications to WHR-808 include increasing the operating power, which constitutes a major

receive and utilize those services in their curricula.[2] Based upon the information set forth in its application, we will treat IEBC in this proceeding as an eligible ITFS licensee.

MUTUALLY EXCLUSIVE SELECTION PROCEDURE

8. In cases of mutually exclusive ITFS applications, where applicants are competing for the same or adjacent channels in the same geographic area, each application is reviewed pursuant to our comparative process. This procedure awards a maximum of 12 merit points based on five criteria deemed to be most relevant to selecting the applicant best qualified to provide the service for which the ITFS spectrum has been established. *Instructional Television Fixed Service - Second Report and Order in MM Docket 83-523 (Second Report and Order)*, 101 F.C.C. 2d 49, 65-72 (1985); 47 C.F.R. §74.913. First, four points are awarded to local applicants. Second, three points are awarded to applicants which are accredited schools, or their governing bodies applying within their jurisdictions. Third, two points are awarded to applicants whose requests would result in the acquisition by these applicants of four or fewer ITFS channels within the particular area. Fourth, either one or two points may be awarded to applicants for specified levels of proposed ITFS programming.[3] Fifth, one point is awarded to applicants which are existing E or F channel licensees seeking to relocate on another ITFS channel group, where such applicants show an established need for an expanded service that cannot be accommodated on their grandfathered E or F facilities. The tentative selectee is the applicant with the highest score.

9. Under this comparative selection process, Indiana University and IEBC are awarded points based on the following criteria:

Localism. Because Indiana University proposes service to its own campus and hospital in Indianapolis, in addition to off-campus sites, it is entitled to four points for being local. IEBC, serving accredited schools in the city of Indianapolis, where it is headquartered, also is entitled to four points.

Accreditation. Indiana University, accredited by the North Central Association of Colleges and Schools and serving its own students, is entitled to three points. Although IEBC proposes to serve accredited institutions, a factor satisfying the basic eligibility of an applicant, IEBC is not an entity accredited in its own right or a qualified umbrella organization, the status necessary for earning merit points in the comparative process. IEBC, therefore, is entitled to no merit points for accreditation. *See Fulton County Schools*, 8 F.C.C. Rcd 402 (1992).

Four-Channel Limitation. Indiana University proposes to modify its permit for WHR-808 on channels B1-B4 essentially by relocating its transmitter and increasing its operating power to 50 watts. Because the four-channel limitation preference applies only to existing permittees which seek modification of their facilities by adding channels, within the four-channel limit, Indiana University is entitled to no merit points. 47 C.F.R. §74.913, Note 3; *Instructional Television Fixed Service - Second Report and Order Recon. Reconsidered*, 1 F.C.C. Rcd 24, 25 (1986). IEBC is neither the licensee of, nor the applicant for, additional ITFS channels in the Trafalgar area, and is, therefore, entitled to two points for remaining within the four-channel limitation.

Instructional Programming. With the advent of the current ITFS application form, Form 330, ITFS applicants have been required to detail their formal educational and other ITFS programming proposals on both a program schedule and a program "grid." For comparative purposes, where amounts and types of programming proposed in the schedule and in the grid are inconsistent, the Commission ordinarily considers as correct the representation resulting in the least number of points to the applicant. *Hispanic Information and Telecommunications Network, Inc.*, 7 F.C.C. Rcd 5924 (1992). However, in the case before us, we are confronted with Indiana University's application for technical modification of WHR-808, which incorporates by reference the original application for that facility, BPLIF-840214DD, including its proposed programming and other legal matters.[4] In 1984, when Indiana University applied for its current authorization, the ITFS application form employed by the Commission, Form 330-P, required an illustrative schedule only, and no grid. In contrast, IEBC's application, submitted on current Form 330, includes both an illustrative schedule and a programming grid. Accordingly, due to the unique circumstances of this case, and in order to preserve basic fairness and equity to both competing applicants, we shall look only to the applicants' illustrative schedules.

Indiana University, whose schedule proposes an average of 55.625 hours of nonformal ITFS programming per channel per week,[5] is entitled to one merit point for instructional

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change as defined by Section 74.911 of the Commission's Rules.

[2] The letter submitted by the Monroe County Community School Corporation, in whose district five of the 17 receive site schools are located, failed to comply with the elements required of such letters of intended use, as provided in Section 74.932, Note 2. Not only did the letter fail to indicate that the district had viewed the proposed programming, but it stated that the letter was "for information only and in no way commits the Monroe County Schools to any monetary or program obligation."

[3] One point is awarded for a proposed schedule of at least 21 average hours per channel per week of formal educational programming or of at least 41 average hours per channel per week of other ITFS programming. Two points are awarded for a proposed schedule of at least 41 average hours per channel per week of formal educational programming or at least 61 hours per channel per week of ITFS programming where at least 21 of those hours are formal educational programming. 47 C.F.R. §74.913(b)(4).

[4] According to Instruction K of Form 330, in lieu of resubmitting the entire ITFS application form, applicants for modification of their existing authorizations are permitted to file with the Commission only the sections pertaining to the proposed changes. The remaining sections, if unchanged since the submission date, may be incorporated by reference to applications already on file at the Commission.

[5] Rather than submit a schedule for channel B2, Indiana University simply specified a list of course offerings available in several of the School of Medicine's departments. Because we are unable to ascertain the amount of hours of instructional programming proposed on that channel, we credit that channel with zero hours in calculating the four-channel average.

programming. IEBC's illustrative schedule proposes an average of 21.5 hours of formal educational programming per channel per week, also entitling it to one merit point.[6]

E- and F- Channel Group Relocation. Neither Indiana University nor IEBC is the current licensee of an E or F channel seeking to relocate to other channels.[7] Consequently, neither is entitled to the one point for such applicants.

Total. Indiana University is entitled to: four points for being local, three points for being accredited, and one point for proposing at least 41 hours of other ITFS educational programming, for a total of eight points. IEBC is entitled to: four points for being local, two points for observing the four-channel limitation, and one point for proposing at least 21 hours of formal educational programming, for a total of seven points. Thus, the tentative selectee is Indiana University.

PETITION TO DENY

10. Because Indiana University is the tentative selectee in the comparative process, we now consider the petition to deny filed against it by IEBC. IEBC argues that Indiana University's application should be dismissed or denied based on four primary grounds: (1) Indiana University's modification is "defective" in that it lacks financial certification; (2) Indiana University is not financially qualified; (3) Indiana University proposes a programming schedule it allegedly admitted it cannot provide; and (4) Indiana University is warehousing frequencies.[8]

11. At the outset we note that notwithstanding Indiana University's assertion to the contrary, IEBC, as a mutually exclusive applicant in this proceeding, has standing to file a petition to deny Indiana University's modification application. *See FCC v. National Broadcasting Co. (KOA)*, 319 U.S. 239 (1943); *Sanders Brothers Radio Station v. FCC*, 309 U.S. 470 (1940). Nor is IEBC's standing disabled by the timing of the submission of its petition, which was filed simultaneously with its application for a new station to operate on the B channels, on which WHR-808 is authorized to operate. Upon the filing of its mutually exclusive application, IEBC became a party in interest, the status required of a petitioner by Section 309(d)(1) of the Act. However, IEBC's petition is defective in that it is supported by a declaration by Thomas P. Farrell, president of IEBC, which states that the facts alleged are true and correct "to the best of my knowledge and belief" rather than based on "personal knowledge thereof," an essential requirement of Section 309(d)(1) of the Act. *See, e.g., Chicago Federation of Labor and Industrial Union Council*, 38 F.C.C. 2d 417, 418 (1972). Nevertheless, in view of the importance of the issues raised here, we will address IEBC's substantive allegations as part of our independent public interest analysis. *See Spanish International Communications Corp.*, 2 F.C.C. Rcd 3336, 3342 n.15 (1987), *aff'd sub nom. Coalition for the Preservation of Hispanic Broadcasting v. FCC*, 931 F.2d 72 (D.C. Cir. 1991)(*en banc*).

12. **Financial Certification and Qualification.** IEBC argues that Indiana University's modification application is defective because it indicates in response to Section III, the financial qualifications portion of the application, that that information is "not required." As support for its allegation, IEBC relies on the language employed in Section III of Form 330, which instructs the applicant not to fill out that section if the application is for a change in an "operating" station. Indiana University's WHR-808, IEBC contends, is not operating and must, therefore, submit the requisite financial information. Because it has not done so, IEBC asserts, the application must be dismissed pursuant to Section 73.3566, which requires dismissal of applications determined to be "patently not in accordance with the FCC rules, regulations, and other requirements, unless accompanied by an appropriate request for waiver."

13. In 1980, the Commission issued a Public Notice in which it deleted the requirement of providing detailed financial information for applicants modifying the facilities of an "existing" station. *Financial Qualification Showing Revised for Station Modification Applicants (Financial Qualification)*, 46 R.R. 2d 1276 (1980). In contrast, we retained the requirement for applicants of "new" stations. Notwithstanding the "operating" station language of Section III of the application form, it is clear from the language of *Financial Qualification* that the Commission intended to exempt from the financial qualification requirement permittees as well as licensees seeking modification: "This new procedure will apply to *all* station change applications effective January 25, 1980." *Id.* (Emphasis added.) We conclude, therefore, that an applicant for modification of an authorized facility need not certify its ability to fund the proposed modification or reestablish its financial qualifications. With regard to Indiana University's modification application, we find that it is not "patently" defective and is not, therefore, subject to dismissal under Section 73.3566.

14. **Programming Schedule.** IEBC argues that Indiana University has admitted it cannot provide the average of more than 50 hours per channel per week of ITFS programming proposed on its application. This admission was made, according to IEBC, in a March 29, 1989 letter from Dorothy Frapwell, Indiana University's associate university counsel, to Thomas P. Farrell. In that letter, Frapwell indicates that Indiana University was advised that in order to enter into an excess capacity lease it would have to program at least 20 hours per week per channel. "After much discussion," Frapwell's letter to Farrell states, "we have determined that at this time we are not capable of programming that number of hours per week." This allegedly inconsistent statement, IEBC asserts, raises the issue of Indiana University's "honest representation of its intent."

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[6] We note that although IEBC's grid indicated an average of only 20 hours of formal educational programming per channel per week, short of the threshold at which merit points are awarded, we are excluding, as discussed above, consideration of its grid in this proceeding.

[7] Indiana University is the current licensee of WAT-21, operating on channels E1 and E2 and has already been granted authorization to relocate to the B channels. The modification application before us, seeking to modify the B channels as authorized, then, does not entitle Indiana University to merit points for migrating from the E channels.

[8] IEBC also contests the modification application based upon alleged defects in Indiana University's recent request for extension of its construction permit. Those issues and allegations, which were concurrently raised against the WHR-808 extension application, were fully addressed and disposed of by the staff in its July 19, 1993 letter, granting Indiana University a six-month extension of time within which to complete construction of WHR-808.

Further evidence of the "veracity" of Indiana University's programming representation, IEBC contends, is Indiana University's reliance here on the programming schedule from its original 1984 application, because "[i]t is hard to believe that nothing has changed [since that time] ...."

15. In opposition, Indiana University submits that Frapwell, associate university counsel, and unfamiliar with communications law, indicated that Indiana University was incapable of transmitting 20 hours per week on the mistaken assumption that the 20 hours had to be new, unrepeated, for-credit programming. An October 19, 1990 letter to James R. Potter, IHETS's director of systems operation and development, from Frapwell confirms this explanation. Accordingly, Indiana University asserts, despite IEBC's allegation to the contrary, the letter has no bearing on the Medical School's ability to "provide the programming it has consistently planned to offer."

16. What IEBC alleges, in essence, is that Indiana University has misrepresented its actual programming proposals to the Commission. Basic to the issue of misrepresentation are the dual elements of a false statement and intent. *See Fox River Broadcasting, Inc.*, 93 F.C.C. 2d 127, 129 (1983). At the outset, we find that IEBC has failed to satisfy even the first element, that Indiana University made a false statement on its application with regard to its proposed programming.

17. Here, the veracity of Indiana University's programming proposals is assailed by IEBC based solely on a statement made to it by Frapwell, the university associate counsel, who, the record shows, had no connection in the preparation of Indiana University's applications. All exhibits for Indiana University's original 1984 application, which include the programming proposals in question, specify that they were prepared under the direction of Beverly Hill, the director of the School of Medicine's Medical Educational Resources Program. Indeed, Hill signed the requisite Purpose and Objectives exhibit, which details the programming to be transmitted on channels B1-B4. The Form 330-P application was signed by J. Mulholland, treasurer of The Trustees of Indiana University. And, the modification application, filed in 1990, was also signed by Mulholland, while the engineering exhibits, the only new portions of the Form 330 resubmitted, were certified as true by Richard Mennel, video systems planning engineer for IHETS.

18. The scope of Frapwell's authority regarding WHR-808, then, appears to have been restricted to her role as legal counsel to Indiana University in negotiating an excess capacity lease with Broadcast Cable, Inc. president Farrell, and not as the Indiana University official responsible for preparing applications or other communications for submission to the Commission. Under the circumstances of this case, we find plausible Indiana University's explanation, which is supported by Frapwell's letter, that when Frapwell indicated to Farrell that Indiana University could not program 20 hours per channel per week, she made that statement based on her incorrect belief that the 20 hours were to be new, unrepeated, formal educational programming.

19. As for what IEBC terms the "wholesale" adoption of Indiana University's original 1984 proposed programming schedule in its modification application, we remind applicants that it is the quantity and type of programming that is represented upon which we rely. Here, Indiana University initially proposed in 1984 to broadcast an average of 55.625 hours of ITFS programming per channel per week. The continued accuracy and reliability in terms of the quantity and type of programming proposed is not undermined by the mere passage of time, especially where, as here, Indiana University has represented in the pleadings now before us that it will abide by its initial proposal. Further, we proceed on the assumption that applicants will carry out their representations to us, *News International PLC*, 97 F.C.C. 2d 349, 356 (1984). In sum, IEBC presents no facts to make a *prima facie* case that Indiana University misrepresented its ability or intent to program the more than 50 hours of ITFS programming per channel per week it proposed in its original application. *See Citizens for Jazz on WRVR, Inc. v. FCC*, 775 F.2d at 397.

20. **Warehousing.** IEBC argues that Indiana University, which has "done nothing but seek to keep the [WHR-808] permit alive," is attempting to "warehouse" channels B1-B4, as well as channels E1 and E2 that it operates on WAT-21. Indiana University's delay in constructing a facility on channels B1-B4, IEBC maintains, has been due to an absence of need and the School of Medicine's inability to program four channels. Nor has Indiana University demonstrated a present need or ability to utilize the frequency, IEBC asserts, as evidenced by Indiana University's unamended 1984 programming schedule and its lack of state appropriations. Thus, IEBC concludes, Indiana University wishes to preserve its license for the B channels "either to block others from obtaining incompatible facilities or to have it when [Indiana University] finally decides that it has a need for it." Additionally, the delay in construction of WHR-808 has also "deprived" the MMDS tentative selectee of access to channels E1 and E2.

21. Section 74.902(d) of the Commission's Rules limits a licensee to the assignment of no more than four channels for use in a single area of operation. And, in an effort to insure the efficient utilization of spectrum, every applicant must demonstrate the need for each channel requested. We evaluate this per-channel justification on an *ad hoc* basis, taking into consideration such factors as: the amount of use of any currently assigned channels and the amount of proposed use of each channel requested; the amount of, and justification for, any repetition in the schedules; and the overall demand and availability of ITFS channels in the community. 47 C.F.R. §74.902(d). Evidence of these factors may be gleaned from the applicant's proposed weekly schedules and the narrative showing of need for each channel. *Second Report and Order*, 101 F.C.C. 2d at 76-77.

22. The staff has already made the determination, in granting Indiana University's original application for a new station operating on channels B1-B4 at Indianapolis, that not only had Indiana University justified the need for those channels, but that it had met the "extremely high" burden for a four-channel waiver, required because Indiana was then already authorized to operate on channels A1-A4, E1, E2 and G2 in Indianapolis. *See* Letter from Chief, Distribution Services Branch to counsel for Indiana University, dated March 6, 1987. In a four-page, single-spaced narrative outlining its needs for channels B1-B4, Indiana University, in seeking authorization to operate those channels, defined its objectives of providing a basic education in medicine to its undergraduate and graduate students and clinical residents, of promoting research, of offering continuing education programs to professionals, and of serving the people of Indiana in all areas of medical sciences and health care. To attain those objectives, Indiana University, in that narrative and accompanying programming schedule, proposed to offer an average of 52.5 hours per week of

patient education on channel B1, an unspecified amount of undergraduate, postgraduate and graduate courses on channel B2, an average of 40 hours per week of teleconferencing capabilities for consultations as to case diagnoses and information sharing on channel B3, and 24 hours daily of videotext capabilities for access to medical on-line data bases and to a physicians' "bulletin board." We find that Indiana University has fully demonstrated its need for channels B1-B4, has indicated no intention of allowing those channels to lay fallow, and is, therefore, not attempting to "warehouse" this frequency.

23. That Indiana University seeks to "block" others from utilizing ITFS frequency is refuted by its voluntary January 13, 1993 request that the Commission dismiss two pending applications for new stations and three pending applications for modifications, as well as cancel two of its authorized facilities in areas where Indiana University is converting to satellite transmission. Moreover, grant to Indiana University of the modification application before us will result in its surrender of the E channels, allaying IEBC's concern that wireless cable operators should gain access to that spectrum.

24. Our grant of this modification application yields an automatic extension of six months from the issuance of the authorization to modify. 47 C.F.R. §73.3535(c). We expect that the modified WHR-808 will be constructed expeditiously and requests for extension of time in which to complete construction will be granted only upon a compelling showing.

25. Having considered all of the information submitted, we find the petition to deny, filed by IEBC, fails to raise a substantial and material question of fact requiring a hearing. *See, e.g., Astroline Communications, Inc. v. FCC,* 857 F.2d 1556 (D.C. Cir. 1988). We further find that Indiana University is fully qualified and that a grant of this application will serve the public interest.

26. Accordingly, IT IS ORDERED, That the petition to deny, filed by Indiana Educational Broadcast Corp., IS DENIED.

27. IT IS FURTHER ORDERED, That the application of Indiana University (BMPLIF-900629DA) IS GRANTED, and the application of Indiana Educational Broadcast Corp. (BPLIF-901009DA) IS DENIED.

28. The staff of the Mass Media Bureau shall send copies of this decision to the applicants by certified mail, return receipt requested.

FEDERAL COMMUNICATIONS COMMISSION

William F. Caton
Acting Secretary

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 93-95

In re Applications of

ERIC R. HILDING File No. BPH-911115MR

JUDY YEP HUGHES File No. BPH-911115MT

For Construction Permit for a
New FM Station On Channel 281A
in Windsor, California

Appearances

Eric R. Hilding, *Pro Se;* Peter A. Casciato, Esq., on behalf of Judy Yep Hughes; and Norman Goldstein, Esq., on behalf of the Chief, Mass Media Bureau, Federal Communications Commission.

SUMMARY DECISION OF
ADMINISTRATIVE LAW JUDGE RICHARD L. SIPPEL

Issued: August 6, 1993; Released: August 18, 1993

PRELIMINARY STATEMENT

1. The two applicant parties to this case are Eric R. Hilding ("Hilding") and Judy Yep Hughes (Hughes"). Summary decision was requested under a Joint Motion For Stay Of Discovery & Stipulated Procedures Concerning Respective Summary Decision Motions Regarding The Standard Comparative Issues that was filed on June 28, 1993. The proceeding was stayed to permit rounds of pleadings on Motion For Summary Decision and Cross Motion for Summary Decision. *See Order* FCC 93M-428, released June 30, 1993.[1]

2. Hilding filed a Motion for Summary Decision on June 14, 1993. He filed a Supplement on June 21, 1993. Hughes filed her Opposition on July 8, 1993. Hilding also filed an unauthorized Reply on July 19, 1993, which will be considered.[2] On July 8, 1993, Hughes filed a Cross Motion for Summary Decision and an Opposition to Hilding's Motion For Summary Decision As Supplemented. And on July 19, 1993, Hilding filed his Opposition.[3]

3. The parties seek mutually exclusive summary decisions on the standard comparative issues, i.e.:

> a. To determine which of the proposals would, on a comparative basis, better serve the public interest.
>
> b. To determine, in light of the evidence adduced pursuant to the specified issues, which of the applications should be granted, if any.

Hearing Designation Order (DA 93-330), 8 F.C.C. Rcd 2495 (MM Bureau 1993) (the *"HDO")*. There are substantial undisputed facts in the record that support summary grant to Judy Yep Hughes.[4] *See Susan D. Brown,* 6 F.C.C. Rcd 7210 (Review Bd. 1991) (summary decision of comparative issues approved).

FINDINGS OF FACT

Eric R. Hilding

4. Hilding is an individual and a United States citizen. He does not qualify for a minority preference. Hilding proposes 100% integration of himself into the station's full-time management and operation. Hilding will cease any conflicting employment activities. It is found that Hilding's integration proposal is feasible. There are no disqualifying factors for his site selection or his financial

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[1] On June 18, 1993, Hilding filed a Motion To Accept Late Filing And Motion For Extension of Time. The relief sought by Hilding was granted under *Order* FCC 93M-428, *supra*. Thus the June 18 motion is moot.

[2] There is no reply pleading authorized in the round of pleadings contemplated by the summary decision procedure. *See* 47 C.F.R. §1.251(b). However, Hilding is proceeding *pro se* and, in the discretion of the Presiding Judge, the reply pleading will be accepted and considered. *See* 47 C.F.R. §1.294(d) (additional pleadings may be required by the Presiding Officer).

[3] There are additional pleadings that were filed by Hilding. Such pleadings are: Supplement To Prehearing Conference Record filed on June 14, 1993; Motion To Accept Late Filing And Motion For Extension of Time filed on June 18, 1993; and Supplement To Motion For Extension Of Time filed on June 21, 1993. These are pleadings which describe in detail the difficulties which Mr. Hilding was experiencing with respect to his compliance with documentary discovery. Because of the subsequent Motion For Stay Of Discovery & Stipulated Procedures that was filed by the parties on June 28, 1993, the miscellaneous pleadings of Hilding identified above are moot and need not be addressed in this ruling. There also was a Supplementary Document Production Request filed by Hilding on June 21, 1993, wherein he seeks documents concerning unspecified civil or criminal lawsuits in which Hilding suggests that Hughes may have been a party. There is no issue pending to which the Request relates and, as framed by Hilding, the request is speculative. Therefore, the Request will not be granted because it is moot, irrelevant, and speculative.

[4] There was a question raised by Hilding at the Prehearing Conference of June 9, 1993, concerning a possible conflict on the part of Peter A. Casciato, counsel for Judy Yep Hughes. *See* Prehearing Conference at Tr. 5-18. Mr. Hilding acknowledged at the conference that he was raising the issue based on recollection and not on documentation. (Tr. 16.) The Presiding Judge concluded preliminarily that there had been no showing made that would justify a disqualification of Mr. Casciato. (Tr. 17-18.) The parties were required to submit documentation *in camera* from which a conclusive ruling could be made. Such documents included minutes of the board of directors' meetings of Coyote Communications, Inc. ("Coyote"). Mr. Casciato maintained that he had only prepared initial incorporation papers for Coyote. The documents submitted for *in camera* review show, to the satisfaction of the Presiding Judge, that Mr. Casciato did not represent Coyote in a substantial way in transactional matters involving broadcast issues. Nor has Mr. Casciato represented Coyote at a time that he could have learned facts about Hilding which could possibly bear on this case. Therefore, it is conclusively determined by the Presiding Judge that Mr. Casciato has no conflict in representing Ms. Hughes in this proceeding.

ability. There have been no qualifying issues added against Hilding. Hilding claims no local residency or residency within his service contour. He does intend to move to Windsor prior to program test authority if he receives the grant.

5. Hilding concedes in his Motion for Summary Decision that he does not qualify for a minority preference; that he does not qualify for any credit for residency within the community or the service area; that he does not qualify for any credit for a civic involvement in the community or the service area; and that the only qualitative merit to which he is entitled is a credit for his broadcast experience. Also, in that pleading Hilding concedes that Hughes qualifies for credit enhancement as a minority, as a local resident, and for participating in qualifying local civic activities.

Judy Yep Hughes

6. Hughes is an individual and a United States citizen. She is a minority of Chinese descent. She proposes to work full time at the station as its general manager. She commits to reducing her present business to three hours per week until her small business is sold. It is found that Hughes' integration proposal is feasible, is made in good faith, and there are no disqualifying factors for her site selection or her financial ability. There have been no qualifying issues added against Hughes.

7. The undisputed Declaration of Ms. Hughes establishes that she has resided within the 1 millivolt contour of her proposed station since 1978. Her residence is located at Healdsburg, CA which is adjacent to or located proximately to Windsor, the city of license. She has been active in local community affairs since 1984, including membership in the Healdsburg Chamber of Commerce; member of the Vineyard Plaza Merchants Association; membership in the Windsor Chamber of Commerce; and a member of the Lakewood Merchant Association. She has been and is also active in other described civic activities in Healdsburg and in Windsor.

Other Comparative Factors

8. Neither Hilding nor Hughes owns an interest in another media of mass communications and therefore neither warrants a diversification demerit. There was no comparative coverage issue set in the *HDO*. Neither Hilding nor Hughes claims any AM daytimer preference. Both Hilding and Hughes propose auxiliary power sources that would be designed to avoid any interruption of a broadcast signal. Hilding has past broadcast experience and Hughes has none.

CONCLUSIONS OF LAW

9. The Commission's rules provide that in considering a motion for summary decision:

> The party filing the motion may not rest upon mere allegations of denials but must show, by affidavit or by other materials subject to consideration by the presiding officer, that there is no genuine issue of material fact for determination at the hearing.

47 C.F.R. §1.251(a)(1). As there are cross motions now pending for summary relief, Hilding and Hughes have the respective burdens of persuading that summary decision would be appropriate based on the evidence submitted. *See Summary Decision Procedures,* 34 F.C.C. 2d 485, 487-88 (1972). Hughes is found to have sustained her burden on the law and the facts. Hilding concedes the relevant facts, which are admissions against his interest, and he loses on the law.

10. Hilding and Hughes are each entitled to 100% quantitative integration credit because each application sets forth a specific integration proposal and there is reasonable assurance that each proposal would be carried out. *See Bradley, Hand & Triplett,* 89 F.C.C. 2d 657, 662 (Review Bd. 1982). Each applicant has committed to withdraw from current employment to work full time at the station and there are no commitments on the part of Hilding or Hughes that would conflict with a full time management proposal at the Windsor station. *See Poughkeepsie Broadcasting, Ltd.,* 5 F.C.C. Rcd 3374, 3380 (Review Bd. 1990).

11. Because each of the applicants is entitled to full quantitative integration credit, the weight of the qualitative enhancements for local residence and civic activities have decisional significance. *Policy Statement On Comparative Broadcast Hearings,* 1 F.C.C. 2d 393, 396 (1965). Hughes qualifies for a significant credit for her residence outside the Windsor community but within the proposed service area. *Id.* Credit for service area residence closely follows credit for local residence. *Waters Broadcasting Corp.,* 91 F.C.C. 2d 1260, 1262-63 (Comm'n 1982). A promise like Hilding's to move to Windsor, by comparison, is entitled only to a slight additional credit. *Great Lakes Broadcasting,* 7 F.C.C. Rcd 1829, 1831, *recon. denied,* 7 F.C.C. Rcd 6548 (Review Bd. 1992).

12. The Commission considers enhancements for civic activity as an adjunct to local residency. *Ronald Sorenson,* 6 F.C.C. Rcd 1952 (Comm'n 1991). The record reflects that Hughes has a pattern of local civic involvement in the city of license and in the service area. She qualifies for a substantial qualitative credit for her local residency of 14 years coupled with qualifying civic activity performed from 1984 to the present. These enhancements are superior to the minor significance which the Commission affords to broadcast experience. *Policy Statement, supra* at 396; *Ronald Sorenson, supra* at 1954. The record supports a grant to Hughes based on her earned enhancements for residency/civic activity.

13. Hilding has argued in his Supplement that the Presiding Judge had erred in failing to find good cause for adding issues requested by Hilding that would have "leveled the playing field" if the issues had been added and resolved in his favor. *See Order* FCC 93M-356, released June 11, 1993 (request for "technical merit" for a custom-designed bay antenna and a compact disc quality music service denied; pioneer preference found not applicable to comparative case for a new FM allotment; requested issue

to challenge the Constitutionality of the Commission's minority preference denied under U.S. Supreme Court decision upholding preference).[5]

RULINGS

Accordingly, IT IS ORDERED that the Motion for Summary Decision filed on June 14, 1993, by Eric R. Hilding IS DENIED.

IT IS FURTHER ORDERED that the Cross Motion for Summary Decision filed on July 19, 1993, by Judy Yep Hughes IS GRANTED.

IT IS FURTHER ORDERED that the application of Eric R. Hilding (File No. BPH-911115MR) IS DENIED.

IT IS FURTHER ORDERED that the application of Judy Yep Hughes (File No. BPH-911115MT) to construct a new FM Station on Channel 281A at Windsor, California, IS GRANTED.[6]

FEDERAL COMMUNICATIONS COMMISSION

Richard L. Sippel
Administrative Law Judge

[5] *Metro Broadcasting, Inc.*, 110 S. Ct. 2997 (1990). The Court recognized that "experience has shown that minority ownership does not guarantee that an applicant will prevail" and "[i]n many cases . . ., even when the minority applicant prevailed, the enhancement for minority status was not the dispositive factor in the Commission's decision to award the license." *Id.* at 3026, n.50. *See also Waters Broadcasting Corp., supra*, 92 F.C.C. at 1265-66 (local residency and minority ownership are entitled to equal substantial weight).

[6] This Summary Decision disposes of the case in its entirety. It shall become effective 50 days after its public release if exceptions are not filed within 30 days thereafter, unless the Commission elects to review the case on its own motion. 47 C.F.R. §1.276(d).

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

UNITED ARTISTS PAYPHONE CORPORATION,
Complainant,
v.

NEW YORK TELEPHONE COMPANY, and AMERICAN TELEPHONE AND TELEGRAPH COMPANY,
Defendants.

File Nos. E-90-181, E-90-182

MEMORANDUM OPINION AND ORDER

Adopted: August 6, 1993; Released: August 18, 1993

By the Commission:

I. INTRODUCTION

1. In this proceeding, the United Artists Payphone Corporation ("UA") contends that the New York Telephone Company ("NYT") and the American Telephone and Telegraph Company ("AT&T") acted unlawfully in attempting to collect charges for allegedly unauthorized interstate and international calls that were either originated or accepted at UA's payphones and completed through the NYT and AT&T networks. As a threshold matter, UA argues that it was not AT&T's "customer" under the relevant tariff provisions and therefore cannot be held liable for the charges associated with the disputed calls. UA further maintains that the defendants failed to control fraudulent calling to the extent possible through network-based measures. Because we agree that UA was not AT&T's customer, we grant UA's complaint against AT&T to the extent indicated herein. We deny, however, UA's request for damages and its complaint against NYT.

II. BACKGROUND

2. Until its payphone business ceased operation in December 1990, the United Artists Payphone Corporation[1] provided approximately 550 payphones for the use of the public in the New York City area.[2] These payphones were connected to the public network by public access lines purchased from defendant NYT.[3] UA chose not to presubscribe these lines to a primary interexchange carrier ("PIC"). Instead, it designated the lines as "PIC-none" or, where that designation was unavailable, "PIC-NYC," which allowed 1+ interLATA calls only to certain locations in northern New Jersey.[4] In addition, UA ordered originating line screening and billed number screening services from NYT for all of the lines at issue.[5] These services indicate to operator service providers any billing restrictions on lines to which a caller may seek to bill a call.[6] UA also ordered from NYT a service to block 10XXX access code calls from UA payphones[7] and programmed its phones to block all outgoing direct-dialed and operator-assisted dialing sequences[8] for interstate and international calls.[9]

3. The unauthorized calls at issue here occurred between early 1988 and December 1990. These calls were either originated or accepted on UA's payphone lines and were carried over the NYT and AT&T networks. Of the approximately $1.4 million in disputed charges levied by AT&T, outgoing direct-dialed calls accounted for 83 to 85 percent of the charges, incoming calls accounted for 14 to 15 percent, and outgoing operator-assisted calls accounted for 1 to 2 percent.[10] Under its billing and collection agreements with AT&T, NYT billed UA for these charges and

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[1] Originally, United Artists Telecommunications, Inc. was an equal partner in its payphone business with Ranlee Communications, Inc. Ranlee originally ordered the public access lines for the payphones from NYT. In April 1989, the complainant, United Artists Payphone Corporation, acquired Ranlee's entire partnership interest in the joint venture. UA Brief at 2 n.3. We refer herein to the complainant and its predecessors and affiliates collectively as "UA." *See* Appendix 1, Joint Stipulation of Facts ("Joint Stip.") para. 1. The appendices cited herein were filed together with UA's brief.

[2] Joint Stip. para. 1.

[3] *Id.* at para. 3. Public access lines are voice-grade, individual exchange lines that connect customer-owned, coin or coinless telephones to NYT's network. NYT Brief at 4.

[4] Joint Stip. para. 34. UA did presubscribe some payphone lines that are not at issue here to AT&T and has apparently paid all charges associated with those lines. UA Brief at 3 n.7.

[5] Joint Stip. para. 35.

[6] *See* Policies and Rules Concerning Operator Service Access and Pay Telephone Compensation, CC Docket No. 91-35: Order on Reconsideration, 7 FCC Rcd 4355, 4361 (1992) (hereinafter *Operator Service Access);* Order on Further Reconsideration and Further Notice of Proposed Rule Making, FCC 93-138 (released April 9, 1993).

[7] UA Complaint para. 15; NYT Answer paras. 9, 14. An "access code" is a sequence of numbers that, when dialed, connects the caller to the operator service provider associated with that sequence. 47 C.F.R. § 64.708(a). Our 10XXX unblocking requirements, in section 64.704(c), do not cover telephones that do not allow interstate calling. *See id.* § 64.708(b) (an aggregator makes telephones available to the public or to transient users of its premises for *interstate* telephone calls using a provider of operator services). The record here shows that UA took steps to ensure that its phones were not used for interstate calls.

[8] "Operator-assisted" or "non-sent paid" calls include collect calls, calls billed to a third telephone number, and calls billed to telephone calling cards. "Direct-dialed" or "sent-paid" calls are calls billed to the telephone from which they are placed. AT&T's Private Payphone Commission Plan, 7 FCC Rcd 7135, 7135 nn.1 , 3 (1992); *see also* 47 C.F.R. § 64.708(g) (definition of "operator services").

[9] App. 6 para. 11 (affidavit of Donald DiRubba). According to this sworn statement, UA programmed its payphones to block "all 1+ calls outside the local calling area, all 011+ [direct-dialed international] calls, all 10XXX calls (until prevented from doing so by the New York Public Service Commission in late 1990), all 00 calls, all 0+ calls (for all lines not presubscribed to a long distance carrier), and all 900-type calls."

[10] Joint Stip. paras. 8-12; UA Brief at 5. UA was originally billed $1,442,070.69 in disputed charges, but AT&T has agreed to the stipulation that UA no logner owes a total of $106,803.29 for: charges that UA has already paid for calls on lines presubscribed to AT&T ($17,751.73); charges for lines never subscribed to UA ($29,314.69); and duplicative charges ($59,736.87). Joint stip. paras. 8n. 3, 9 (AT&T has stipulated to these figures for purposes of this proceeding only).

notified AT&T when UA disputed them.[11] UA also directly notified AT&T on an ongoing basis when, in monitoring call records, it discovered unauthorized calls involving its payphones.[12] AT&T has a policy of adjusting disputed charges under certain circumstances and did, in fact, remove some disputed charges from UA's bills.[13]

4. UA and AT&T were unable to reach a settlement regarding the remaining disputed charges, and on May 14, 1990, UA filed these complaints against NYT and AT&T. The following month, AT&T initiated litigation in federal court against UA regarding the same disputed charges.[14] In the instant complaint proceedings, the parties engaged in extensive discovery, including the taking of depositions, and filed detailed briefs.[15]

III. DISCUSSION

A. Whether United Artists was AT&T's Customer.

5. As discussed below, we have concluded that UA is not liable for the disputed charges here. Under the relevant AT&T tariff provisions, the "customer" who "orders" service is responsible for charges associated with that service. Applying a relevant analysis from a separate proceeding,[16] we have determined that the customer for the operator-assisted calls at issue here was the end user or billed party, not UA, the payphone owner. Further, we have found that UA did not order direct-dialed service by presubscribing its payphone lines to AT&T. Moreover, the record shows that UA took affirmative steps to control unauthorized operator-assisted and direct-dialed calling and, by those steps, avoided constructively ordering service from AT&T. Because UA did not intentionally or constructively order service from AT&T, it was not AT&T's customer and could not be held liable under tariff provisions that place liability on the "customer." Hence, AT&T's attempts to collect the disputed charges were inconsistent with its tariff provisions and thereby violated section 203(c) of the Communications Act.

1. Contentions of the parties.

6. UA first argues that it was not AT&T's "customer" and therefore is not liable for the disputed charges under the relevant tariff provisions, which impose liability only on "customers."[17] UA maintains that, unlike a customer, it never ordered AT&T service for the payphone lines at issue through presubscription or any other affirmative selection process.[18] According to UA, the customer here was the end user who placed the disputed calls,[19] a conclusion that UA contends is directly supported by Commission precedent, including the decision in *AT&T's Private Payphone Commission Plan*.[20]

7. AT&T responds that presubscription alone does not determine who is a customer under AT&T's tariff.[21] AT&T contends that UA "ordered" or "requested" service by connecting its payphones to the public switched network in such a way that access code calls could be sent to the AT&T network and collect or third party-billed calls carried by AT&T could be accepted at the payphones.[22] UA, "by not removing the telephones or effectively preventing the telephones from connecting to the AT&T network, ordered service from AT&T."[23] AT&T further asserts that *Private Payphone* recognizes that payphone owners are AT&T customers for the type of calls at issue.

8. In its reply brief, UA repeats that it cannot be viewed as AT&T's customer because it did not order, subscribe to, or otherwise select AT&T service for the payphone lines at issue.[24] UA also challenges AT&T's broad interpretation of the term "order," contending that all telephone owners would be AT&T's "customers" under this interpretation.[25] In addition, UA argues that according to *Private Payphone*, end users of payphones, not payphone owners, are the carrier's customers for operator-assisted calls.[26] UA asserts that the same reasoning applies to 10XXX access code calls. Further, UA points out that the payphone owners who were found to be AT&T's customers for direct-dialed calls in *Private Payphone* had presubscribed their phones to AT&T.[27]

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[11] Joint Stip. paras. 16-19.

[12] Joint Stip. paras. 39-43; App. 5 paras. 23-24 (daily communications with NYT and AT&T regarding fraudulent calls).

[13] Joint Stip. paras. 21, 24-26 (AT&T's policy for adjusting charges covers "clip-on" fraud, which occurs when a "clip-on" device is attached to a line on the carrier side of the demarcation point and is used to make unauthorized calls).

[14] AT&T v. United Artists Payphone Corp., 90 Civ. 3881 (PKL) (S.D.N.Y. filed June 7, 1990). This action has been stayed pending the resolution of UA's formal complaints before the Commission. UA Brief at 3 n.9.

[15] In addition, NYT filed a motion to dismiss together with its answer, arguing that UA's complaint should be dismissed because it concerns NYT's deregulated billing and collection services and local exchange services that are tariffed with the state commission. UA responds that its complaint against NYT actually concerns NYT's "deficient provision of access and local exchange services," which, it says, "appears to be a principal cause for the fraudulent calling" at issue. UA Brief at 10 n.30. In light of our disposition of the complaint against AT&T, we need not reach any conclusions regarding NYT, and we therefore dismiss its motion as moot.

[16] AT&T's Private Payphone Commission Plan, 3 FCC Rcd 5834 (Com. Car. Bur. 1988), *aff'd*, 7 FCC Rcd 7135 (1992).

[17] UA Brief at 12-23. UA characterizes AT&T's attempts to collect under its tariff provisions as a violation of section 201(b) of the Communications Act, 47 U.S.C. § 201(b), which prohibits unjust and unreasonable practices by common carriers. Because UA is arguing that AT&T is acting in a manner inconsistent with its tariff, however, we will examine AT&T's practices under section 203(c), which provides in part that "no carrier shall ... charge, demand, collect, or receive a greater or less or different compensation, for [interstate and foreign wire or radio] communication, or for any service in connection therewith, ... than the charges specified" in an effective tariff on file with the Commission.

[18] UA Brief at 14-17.

[19] *Id.* at 19.

[20] 3 FCC Rcd 5834 (Com. Car. Bur. 1988), *aff'd*, 7 FCC Rcd 7135 (1992) (hereinafter *Private Payphone*).

[21] AT&T Brief at 6-7. NYT takes no position on the issue of whether UA was AT&T's customer under the tariff. NYT Brief at 3.

[22] AT&T Brief at 8-9.

[23] *Id.* at 9.

[24] UA Reply Brief at 7-8.

[25] *Id.* at 9.

[26] *Id.* at 11-13.

[27] *Id.* at 12.

2. Decision.

9. After considering the relevant tariff provisions, the *Private Payphone* decision, and the record before us, we conclude that UA was not AT&T's customer here. One of the relevant tariff provisions, section 2.4.1.A of AT&T Tariff F.C.C. No. 1, states in part that the "*Customer* is ... responsible for the payment of bills for LDMTS ['Long Distance Message Telecommunications Service']."[28] The term "customer" is defined by the tariff as "the person or legal entity which *orders* LDMTS (either directly or through an agent) and is responsible for payment of tariffed charges for services furnished to that Customer."[29] The meaning of these tariff provisions is that the entity or person who is liable for the charges is the "customer" and that only an entity or person who has "ordered" service from AT&T can be a "customer." In other words, UA would have to have ordered service from AT&T in order to be a customer and, therefore, liable for the charges at issue. As AT&T has acknowledged, its tariff does not define "order."[30] In the absence of a tariff definition to the contrary, we will give the term "order" its common meaning of a request that something be supplied.[31] In the instant context, this meaning requires some affirmative act by the "customer" to establish a relationship with and receive service from AT&T, such as presubscription or some other act that would indicate an intention that AT&T service be available from UA payphones.

10. *Operator-assisted calls.* In *Private Payphone*, we considered the issue of whether a payphone owner is a carrier's customer, so that we could determine whether a carrier's commission payments to payphone owners are unlawful rebates. There, under AT&T's commission plan, participating payphone owners were required to presubscribe their phones to AT&T for both operator-assisted ("0+") and direct-dialed ("1+") traffic, and they then received commissions based on the amount of operator-assisted traffic sent to AT&T from their phones.[32] Affirming the Common Carrier Bureau's original decision, we concluded that the payphone owners who received the commissions were not AT&T's customers for the operator-assisted calls upon which the commissions were based. Instead, the customer for each operator-assisted call was the end user or billed party, "the entity receiving and paying for long distance service pursuant to AT&T's applicable tariff."[33] Consistent with this finding, AT&T has stipulated herein that "[f]or AT&T's operator services, AT&T deems the end user who places the call from a private payphone, not the owner of the location from which the call is placed, to be AT&T's customer."[34]

11. The rationale for this view is clear: the end user who places the operator-assisted call or the billed party who accepts the charges is "ordering" service from AT&T through an affirmative act.[35] The payphone owner, on the other hand, is not requesting service from the carrier in any affirmative way. Moreover, even if the payphone owner were to presubscribe its phones for operator-assisted service, this act would not, by itself, designate the payphone owner as the customer under the *Private Payphone* rationale, because operator-assisted service is not intended to be billed to the originating, presubscribed line. Given these facts, a payphone owner cannot be held liable for unauthorized operator-assisted calls absent a carrier-customer relationship. Further, as we discuss below, UA took affirmative steps to prevent even the inadvertent establishment of a carrier-customer relationship: UA did not presubscribe its payphone lines at all and purchased services from NYT to screen operator-assisted calls and ensure that such calls were not charged to its payphone lines.

12. *Direct-dialed calls.* AT&T claims that *Private Payphone* recognizes that payphone owners are AT&T's customers for direct-dialed calls.[36] As UA points out, however, the payphone owners at issue in that proceeding had presubscribed their lines to AT&T's direct-dialed service.[37] Presubscription is very significant in the case of direct-dialed services because both the carrier and the subscriber, who is "ordering" service, intend the charges for such services to be billed to the originating line.[38] In the present proceeding, UA chose to forego presubscription of its payphone lines to any interstate direct-dialed service. Hence, *Private Payphone* does not compel a finding that UA was AT&T's customer for the direct-dialed calls at issue. Moreover, as we will next discuss, UA did more than simply forego presubscription in its efforts to avoid becoming AT&T's customer.

13. *UA's additional efforts to avoid "ordering" service.* We have found that payphone owners such as UA are not, under *Private Payphone*, customers of interstate carriers for operator-assisted services. We have also determined that UA did not presubscribe its payphone lines to AT&T for direct-dialed service and did not thereby affirmatively order

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[28] (Emphasis added.) Section 2.4.1.A further provides that the customer's obligation

> includes payment for LDMTS calls or services:
>
> - Originated at the Customer's number(s),
>
> - Accepted at the Customer's number(s) (e.g., Collect Calls),
>
> - Billed to the Customer's number via Third Number Billing if the Customer is found to be responsible for such call or service, the use of a Calling Card, the use of AT&T EasyReach Service, or the use of a Company-assigned Special Billing Number, and
>
> - Incurred at the specific request of the Customer.

[29] AT&T Tariff F.C.C. No. 1 § 2.10 (emphasis added).

[30] AT&T Brief at 8.

[31] *See* Webster's II New Riverside Univ. Dictionary 827 (1984).

[32] *Private Payphone*, 7 FCC Rcd at 7135.

[33] *Id.* at 7135-36; *accord* 3 FCC Rcd at 5836. The commissions therefore did not constitute unlawful rebates because the payments were not being made to the customer.

[34] Joint Stip. para. 30.

[35] This rationale applies equally to operator-assisted access code calls, such as those initiated with a 10XXX-0+ dialing sequence, where the customer will likely be choosing a carrier with which even a presubscribed payphone owner has no relationship.

[36] AT&T Brief at 9.

[37] UA Reply Brief at 12.

[38] *Private Payphone*, 7 FCC Rcd at 7135 n.3 ("sent-paid" or "1+" direct-dialed calls are billed by presubscribed carrier to the payphone from which they originate); *accord* 3 FCC Rcd at 5836.

such service. As AT&T argues, however, presubscription is not the only way to "order" service from a carrier and, thus, become a "customer."[39] The record of this proceeding demonstrates that in the equal access environment, where callers have a right to choose their preferred operator service providers by using access codes, unauthorized operator-assisted calling can occur, resulting in charges to payphone lines.[40] The record also shows that unauthorized direct-dialed calling was also a risk for UA, even in the absence of a presubscription arrangement.[41] If UA had failed to take steps to control unauthorized operator-assisted and direct-dialed calling and had, instead, installed its phones in such a way as to allow callers to charge such calls to UA payphone lines, UA could reasonably be held to have constructively "ordered" service from AT&T, thus establishing an inadvertent carrier-customer relationship. In view of the evidence in the record before us, we find it necessary to determine whether UA took reasonable steps to prevent unauthorized callers from gaining access to the AT&T network.

14. The record shows that UA implemented a number of measures designed to control potentially fraudulent operator-assisted or direct-dialed calling. First, when ordering public access lines from NYT, UA told NYT that the payphone lines in question were to have no primary interexchange carrier.[42] In other words, UA intentionally refrained from requesting interexchange service from AT&T or any other carrier. Further, if operator-assisted interexchange calls did originate or terminate at UA payphones, the originating line and billed number screening services that UA ordered from NYT for all of its payphone lines[43] were intended to inform operator service providers of any billing restrictions on those lines.[44] UA also ordered NYT's 10XXX Restrict service, which was intended to block both operator-assisted and direct-dialed 10XXX sequences.[45] The parties have stipulated, however, that NYT apparently failed to provide this service to some extent, resulting in the continuation of fraudulent 10XXX calling.[46] In addition to the network-based fraud control services it ordered, UA programmed its payphones to block operator-assisted and direct-dialed calling outside of the local area.[47] Beyond all of these preventative steps, UA monitored calling from its phones and regularly reported any apparently fraudulent calling to NYT and AT&T.[48] These reports, however, apparently elicited little active response from the defendants.[49]

15. Based on the record before us, we find that UA took reasonable steps to secure its payphones against fraudulent calling[50] and that it therefore did not constructively order the services used to make the calls at issue. Because UA did not intentionally or constructively order services from AT&T, UA was not AT&T's customer and cannot be held liable for the disputed charges. Under these circumstances, we conclude that AT&T's efforts to collect the charges were in violation of section 203(c) of the Communications Act, which prohibits carriers from demanding compensation different from that set forth in their tariffs.[51]

16. UA also argued that even if it were found to be AT&T's customer, it could not be held liable because NYT acted unlawfully in allowing the disputed calls to be completed.[52] In light of our conclusion that UA was not AT&T's customer and could not be held liable under AT&T's tariff, we need not address UA's claim regarding NYT. We therefore deny UA's complaint against NYT.

B. Damages.

17. UA requests that we order the defendants to pay certain damages. The requested damages include: (1) the costs UA incurred in analyzing and attempting to prevent the fraudulent calls; (2) the costs of purchasing and installing fraud control equipment in UA payphones; and (3) attorneys' fees and disbursements.[53]

18. We deny UA's claims for damages. The first two categories of requested damages concern costs associated with fraud prevention and control. We have determined, however, that if UA had not taken reasonable steps to prevent and control fraudulent calling, it could be held to have constructively "ordered" service from AT&T, resulting in its liability for charges associated with such calls. We decline to require the defendants to pay damages for the costs associated with this fraud prevention and control.

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[39] AT&T Brief at 6-9.

[40] *See* Joint Stip. paras. 8-12 (outgoing operator-assisted calls accounted for 1 to 2 percent of the disputed charges; incoming calls, some of which may have been operator-assisted, accounted for 14 to 15 percent).

[41] *See id.* at paras. 8-12 (outgoing direct-dialed calls accounted for 83 to 85 percent of the disputed charges).

[42] Joint Stip. para. 34.

[43] *Id.* at para. 35.

[44] Using coded information, screening services advise operator service providers of any billing restrictions on lines to which a caller may seek to bill a call. *See Operator Service Access*, 7 FCC Rcd at 4361. When we adopted the requirement that local exchange carriers make screening services available to aggregators such as payphone owners, we intended that these services be effective in controlling unauthorized calling. For them to be effective, it would appear necessary for operator service providers to act in response to the coded information.

[45] Joint Stip. at paras. 37-38.

[46] *Id.* at para. 38. In our operator service rule making proceedings, we required local exchange carriers to offer both screening and international blocking services. These services, together with other available measures, should be able to prevent fraudulent 10XXX calling. *See Operator Service Access*, 7 FCC Rcd at 4359-62.

[47] App. 6 para. 11.

[48] Joint Stip. paras. 39-43; App. 5 paras. 23-27.

[49] *See* App. 5 paras. 23-27.

[50] The defendants have also argued that UA could have ordered public access lines that would not allow incoming calls, thus removing the risk of fraudulent collect or third party-billed calls. NYT Brief at 4; AT&T Brief at 17. UA responds that this restriction would have prevented remote, computer-based testing of the lines. UA Reply Brief at 32-33. In addition, UA cites evidence that, beginning in early 1989, all of its payphones were programmed to block incoming calls. *Id.* at 33 (citing App. 6 para. 7). Given this fact and the other steps UA took to prevent fraudulent calling, we do not think UA should be held liable for the disputed charges simply because it did not order restricted public access lines.

[51] 47 U.S.C. § 203(c). Given our action herein, we need not decide the complainant's claim that the defendants violated section 201(b) of the Act.

[52] *See* UA Brief at 29-39.

[53] *Id.* at 45-46. UA also requested that any liability for the disputed charges be offset by the amount of UA's lost profits caused by fraudulent calling. Given our ruling herein, this request is moot.

Moreover, an award of damages would imply that one or both of the defendants violated the Communications Act by allowing the unauthorized calls to be completed.[54] The record before us does not conclusively disclose which, if either, of the defendants handled the calls in an unreasonable manner,[55] and we therefore must refrain from making such a finding.

19. UA has also requested that we order the defendants to pay attorneys' fees and disbursements. We have no power to award attorneys' fees.[56] We therefore deny this request.

IV. CONCLUSION

20. In this proceeding involving disputed charges for unauthorized calls originated or accepted at the complainant's payphones, we have found that the complainant, United Artists Payphone Corporation, did not "order" service, either intentionally or constructively, from the interexchange carrier of the calls, AT&T, and that UA was therefore not AT&T's "customer" under the definition of that term in AT&T's tariff. Because UA was not AT&T's customer, we have concluded that UA was not liable for the disputed charges under the explicit terms of the relevant tariff provisions. Accordingly, AT&T's attempts to collect the disputed charges were inconsistent with its tariff provisions and thereby violated section 203(c) of the Communications Act. For the reasons stated above, however, we have denied the complainant's request for damages and its complaint against NYT.

V. ORDERING CLAUSES

21. Accordingly, IT IS ORDERED, pursuant to sections 4(i) and 203(c) of the Communications Act of 1934, as amended, 47 U.S.C. §§ 154(i), 203(c), that the above-captioned complaint filed by the United Artists Payphone Corporation against the American Telephone and Telegraph Company IS GRANTED to the extent indicated herein and IS OTHERWISE DENIED.

22. IT IS FURTHER ORDERED, pursuant to section 4(i) of the Communications Act of 1934, as amended, 47 U.S.C. § 154(i), that the above-captioned complaint filed by the United Artists Payphone Corporation against the New York Telephone Company IS DENIED.

23. IT IS FURTHER ORDERED that the motion to dismiss filed by the New York Telephone Co. IS DISMISSED.

FEDERAL COMMUNICATIONS COMMISSION

William F. Caton
Acting Secretary

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[54] By contrast, we have concluded that AT&T has violated section 203(c) by attempting to collect the disputed charges in a manner inconsistent with its tariff.

[55] Each defendant has explicitly suggested that the other bears some responsibility for the fraudulent calls. *See* NYT Brief at 3-4; AT&T Brief at 17. Neither, however, has made a formal claim against the other in this proceeding.

[56] Comark Cable Fund III v. Northwestern Indiana Telephone Co., 100 FCC 2d 1244, 1257 n.51 (1985), *remanded on other grounds*, 824 F.2d 1205 (D.C. Cir. 1987), *review denied*, 872 F.2d 465 (D.C. Cir. 1989), *cert. denied*, 110 S. Ct. 757 (1990); Strouth v. Western Union, 70 FCC 2d 506, 511, 567 (1978).

Before the
Federal Communications Commission
Washington, D.C. 20554

LETTER
August 10, 1993

Released: August 18, 1993

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In re: WRNL(AM), Richmond, VA
BAPL-930226GE

WRXL(FM), Richmond, VA
BALH-930226GF

Dear Counsel:

This letter is in reference to the above-captioned applications for consent to assign the licenses of WRNL(AM) and WRXL(FM), Richmond, Virginia, from Capitol Broadcasting Company of Virginia, Inc. ("Capitol") to Clear Channel Radio Licenses, Inc. ("Clear Channel") and the April 12, 1993, petition to deny those assignments filed by Four Seasons Communications Partners, L.P. ("Four Seasons"), the parent company of WMXB License Partnership, licensee of WMXB(FM), Richmond, Virginia. On April 26, 1993, Clear Channel filed an opposition and on April 27, 1993, Capitol filed an opposition.[1]

In the assignment applications, Clear Channel states that it is the licensee of WRVA(AM) and WRVQ(FM), Richmond, Virginia. Since the principal community contours of WRNL(AM), WRXL(FM), WRVA(AM), and WRVQ(FM) overlap, Clear Channel included an exhibit pursuant to 47 C.F.R. § 73.3555(a)(1),[2] which demonstrates that the majority of the overlap between the proposed commonly owned stations occurs within the Richmond Arbitron metro market area, that there are at least 23 radio stations whose contours overlap the contours of WRNL(AM), WRXL(FM), WRVA(AM), WRVQ(FM), and that the combined audience share of the proposed commonly owned stations is 24.7 percent.

Four Seasons, in its petition, argues that the assignment applications should be denied because the proposed acquisition would result in undue concentration in the Richmond radio market. It further contends that no binding purchase agreement or time brokerage agreement has been filed with the applications and, thus, the applications should be considered as substantially incomplete.

First, Four Seasons contends that the proposed commonly owned stations have historically had a combined audience share of more than 25 percent. It further asserts that the Fall 1992 Arbitron rating of 24.7 percent, the most recently published data available at the time the applications were filed, is particularly unreliable because Clear Channel deliberately decreased its promotional activity for WRVQ(FM) resulting in lower than normal ratings. Four Seasons supports this latter contention by attaching the declaration of Robert Stephen Smith, former operations program manager for WRVQ(FM), who states that after Clear Channel purchased WRVQ(FM) in June of 1992, no budget was set aside for promotions and only minimal promotional efforts were undertaken. Four Seasons claims that the average of the combined audience shares of all four stations over several ratings periods would better represent the proposed combination's real market power and that use of such trend data is specifically allowed by *Memorandum Opinion and Order and Further Notice of Proposed Rule Making* in MM Docket No. 91-140, 7 FCC Rcd 6387, 6398 n.71 (1992) (*"Memorandum Opinion and Order"*) when a "single ratings period does not accurately measure audience share."[3] In support of this argument, Four Seasons attaches the declaration of Brian White, the program manager of WMXB, who states that the Fall 1992 Arbitron survey was the only time since 1986 that the audience share of the proposed combination has fallen below the Commission's 25 percent benchmark.

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[1] On May 4, 1993, Four Seasons filed a reply to the oppositions.

[2] Section 73.3555(a)(1) of the Commission's rules, 47 C.F.R. § 73.3555(a)(1), states in pertinent part:

> No license for an AM or FM broadcasting station shall be granted to any party . . . if the grant of such license will result in overlap of the principal community contour of that station and the principal community contour of any other broadcasting station directly or indirectly owned, operated, or controlled by the same party, except . . . [i]n radio markets with 15 or more commercial radio stations, a party may own up to 2 AM and 2 FM commercial stations, provided, however, that evidence that grant of any application will result in a combined audience share exceeding 25 percent will be considered *prima facie* inconsistent with the public interest.

[3] According to Four Seasons, the combined shares of the stations for the four quarterly periods in 1992 were 25.8, 26.5, 26.6, and 24.7, respectively. The unweighted average of the combined shares for the entire year, as determined by Four Seasons, is 25.9 percent.

Second, Four Seasons argues that since no binding purchase agreement or time brokerage agreement was included with the application at the time of filing, only a nonbinding letter of intent, the assignment applications should be dismissed as substantially incomplete. Further, Four Seasons states that the brief summary of the time brokerage agreement submitted in the letter of intent indicates that there may have been an unauthorized transfer of control as it appears that Capitol has abdicated its responsibilities for the finances of the stations to Clear Channel.

Clear Channel, in its opposition, argues that the Commission intended for applicants to submit the most recent Arbitron data available at the time of filing. Clear Channel claims that allowing petitioners to ignore the most recent Arbitron data in favor of earlier data better suited to their position would open up the floodgates to meritless claims resulting in a waste of the staff's time and resources, and inject an increased level of uncertainty into the application process. Clear Channel also claims that Four Seasons' allegation that the budget for promotions was decreased is inaccurate as Clear Channel increased the promotional budget of WRVQ(FM) by 31 percent over a six-month period beginning on July 1, 1992, when it first took control of the station, and undertook extensive improvements in the programming of the station to help increase ratings. Clear Channel also argues that Four Seasons has misinterpreted the Commission's policy regarding statistical anomalies and trend data. Clear Channel contends that the Commission did not intend to allow for the submission of alternative or trend data by a competitor who alleges that the most recent Arbitron data showing no more than a 25 percent combined audience share is anomalous, but instead intended to allow for the submission of such data only by applicants where the combined audience share is 25 percent or higher due to an anomaly. Regarding the contention that no binding purchase agreement or time brokerage agreement has been filed with the Commission, Clear Channel states that these documents were filed with the Commission on April 7 and April 9, 1993, respectively, and thus, all documents necessary have been provided in the applications.[4]

Capitol, in its opposition, specifically denies Four Seasons' contention that it abdicated control of the finances of the stations to Clear Channel. Capitol states that the vice president/general manager, station engineer, and bookkeeper it employed at WRVA(AM) and WRVQ(FM) prior to commencement of negotiations with Clear Channel have remained in its employ in their respective roles at the stations. In addition, Capitol argues that its bookkeeper continues to pay all salaries and other employee expenses, all costs of operating the stations with the exception of those costs expended for program production and delivery, and the expenses for the six hours of programming Capitol reserves for itself. Capitol also contends that it retains the right to refuse programs or to preempt programs in accordance with its duties as a licensee. Finally, Capitol asserts that it remains financially accountable for the overall management of the stations and has in no way ceded control to Clear Channel.

In reply, Four Seasons reiterates its earlier allegations and further asserts that an unauthorized transfer of control has indeed occurred because, since the signing of the time brokerage agreement, Clear Channel is ultimately responsible for most of the expenses incurred at the stations.

In order to assess the merits of a petition to deny, a two step analysis is required. First, Section 309(d)(1) of the Communications Act, as amended, requires that the petition to deny contain specific allegations of fact that, if true, are sufficient to show that a grant of the application would be *prima facie* inconsistent with the public interest, convenience, and necessity. *See* 47 U.S.C. § 309 (d)(1) and (d)(2). If the petition meets this threshold requirement, the Commission must then examine all of the material before it to determine whether there is a substantial and material question of fact requiring resolution in a hearing. *See Astroline Communications Co. v. FCC*, 857 F.2d 1556, 1561 (D.C. Cir. 1988). Even assuming, *arguendo*, that Four Seasons' allegations establish a *prima facie* case, based on an examination of the applications, the petition, the oppositions and related pleadings, we conclude, in light of the circumstances discussed below, that the matters do not raise any substantial or material questions of fact that would require resolution in a hearing.

In the proceeding establishing the limits on radio ownership, which became effective September 16, 1992, the Commission determined that a single entity would be allowed to own up to two AM and two FM broadcast stations in a single market if there are 15 or more stations in that market and the proposed combination does not lead to "excessive concentration in the market." Excessive concentration is presumed where the stations to be jointly owned have a combined audience share exceeding 25 percent. *Memorandum Opinion and Order*, 7 FCC Rcd at 6393; 47 C.F.R. § 73.3555(a)(1)(ii). The Commission emphasized that audience share is best measured with widely-used audience survey data, such as Arbitron's, because such data are probative and readily accessible measures of market power. *Memorandum Opinion and Order*, 7 FCC Rcd at 6397. Therefore, the Commission stated that if audience share data for the market are readily available from Arbitron or a similarly published ratings service, applicants will be required to provide that audience share data. Although the rule is ambiguous as to what time period is applicable in determining the audience share of the proposed commonly owned stations, the Commission recently held that "it is reasonable to interpret the rule to require applicants to demonstrate that the proposal will not result in excessive local concentration, and that *prima facie* evidence of excessive local concentration is a combined audience share exceeding 25 percent, based upon the most recent audience share data available at the time that the application is filed." *Franklin Communications Partners, L.P. (WCAW(AM)/WVAF-FM)*, 8 FCC Rcd 4909, _____ para. 8 (1993). In the case at hand, Clear Channel has submitted evidence that the combined audience share for the proposed combination, based upon the most recent audience share data available at the time of filing, is 24.7 percent. This figure is clearly within the Commission's 25 percent audience share limit.

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[4] Finally, Clear Channel alleges that the petition to deny is an attempt by Four Seasons to prevent competition and delay further entry by Clear Channel into the Richmond market. Since Clear Channel has made no attempt to establish that the petition is a strike pleading, we find no basis to its claim of anti-competitive behavior.

Regarding Four Seasons' argument that the Fall 1992 Arbitron showing is anomalous or particularly unreliable, we find that Four Seasons has failed to substantiate this contention. While the Commission provided for the submission of alternative showings in appropriate cases,[5] the applicant bears the burden of demonstrating compliance with the Commission's audience share threshold. Conversely, if a petitioner is the party submitting the alternative or trend data, the petitioner bears the burden of demonstrating that the data available from Arbitron or a similarly published ratings service is unreliable or anomalous. Four Seasons' argument that Clear Channel decreased its promotional activities in order to lower ratings is unpersuasive without actual evidence of deliberate ratings manipulation. Also, Clear Channel has provided information that it increased its promotional activity after assuming control of WRVA(AM) and WRVQ(FM). Further, Four Seasons has failed to provide any evidence to support its contention that the Fall 1992 Arbitron survey is the first time since 1986 that the audience share for the proposed combination has fallen below 25 percent. It has not supplied any audience share data for the years in question. In any event, the Commission has clearly stated that "evidence of the combined audience share will be evaluated based on the most recent published survey data available at the time [that] the application is filed." *Franklin Communications Partners*, at para. 8. We also observe that the Fall 1992 combined audience share of 24.7 percent is not a sizeable drop from the prior ratings data submitted by Four Seasons for the entire 1992 year.[6] In sum, Four Seasons has failed to provide sufficient evidence to warrant characterizing the Richmond Fall 1992 Arbitron survey as either unreliable or anomalous. Additionally, we do not accept Four Seasons' contention that the average of the combined shares for the past year is a better indicator of WRVA(AM) and WRVQ(FM)'s market position. The Commission stated that data averaged over a number of survey periods may be used in certain situations, but only when it has first been established that such data eliminates statistical anomalies in the generally accepted and available audience research data. *See Memorandum Opinion and Order, supra*, at 6399. As noted, Four Seasons has failed to make such a showing as to the Fall 1992 Arbitron results.[7]

Next, we will address the time brokerage agreement and the alleged unauthorized transfer of control. Section 310(d) of the Communications Act of 1934, as amended, 47 U.S.C. § 310(d), prohibits the transfer of control of a station from one party to another without prior Commission consent. While the Commission has no exact formula for determining whether control has been transferred, we traditionally have looked beyond the legal title to determine whether another entity has been given the right to determine the day-to-day operating policies of the station. The licensee may delegate certain functions; however, it must retain ultimate responsibility over all station matters involving personnel, programming, and finances. *See Salem Broadcasting, Inc.*, 6 FCC Rcd 4172 (1991); *Benito B. Rish*, 6 FCC Rcd 2628 (1991); *Southwest Texas Public Broadcasting Council*, 85 FCC 2d 713 (1981). In the present case, Capitol asserts that (i) the three employees vital to the operation of the stations remain in its employ; (ii) it retains the right to refuse or preempt programs as it see fit and reserves six hours of programming for itself; and (iii) it has control over all costs of operating the stations with the exception of those costs associated with program production and delivery of the programming supplied by Clear Channel. Four Seasons has failed to provide any convincing evidence to refute these contentions. Therefore, no substantial and material question of fact has been presented that Capitol, the licensee, has not retained ultimate control over the operations of WRVA(AM) and WRVQ(FM).[8]

Based upon the foregoing, we conclude that there are no remaining substantial and material questions of fact, that the applicants are qualified to be Commission licensees, and that a grant of the subject assignment applications would be in the public interest. Accordingly, the petition to deny filed by Four Seasons Communications Partners, L.P. and the informal objection filed by Robert C. King, Jr.

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[5] *See Memorandum Opinion and Order*, 7 FCC Rcd at 6399 and Note following 47 C.F.R. § 73.35555 (a) (1) (ii), which states:

> Note: When evaluating audience share evidence submitted under § 73.3555 (a) (1) (ii), the Commission will consider data that eliminates statistical anomalies, provides a better focused survey area or includes revenue data or other relevant information. Where applicants certify that they do not have readily available audience share data, they may substitute other information that can serve as a proxy for each [sic] data. See Memorandum Opinion and Order in MM Docket No. 91-140, FCC 92-361 (released Sept. 4, 1992).

[6] We note that the newly-available first quarter 1993 Arbitron data indicates that the combined audience share for the proposed combination fell to 22.6 percent. While we do not rely on this drop off in reaching our ultimate decision to grant the applications, we nevertheless observe that it supports our view that there is no evidence that the Fall 1992 combined audience share of 24.7 percent was anomalous.

[7] Four Seasons, in its petition to deny, argues that because it has raised a *bona fide* issue as to compliance with the 25 percent audience share limit, this matter should be acted upon by the full Commission. Clear Channel, however, asserts that the Commission's staff is clearly authorized to deny the petition because Clear Channel's ownership showing is based upon Arbitron data, not non-Arbitron data, and that the data supplied is the most recent data available, thus, complying with the revised multiple ownership rules. In the proceeding adopting the revised radio ownership rules, the Commission noted that while the staff has delegated authority to act on applications that are in compliance with the revised rules, any applications that involve *bona fide* issues as to compliance with the Commission's 25 percent audience share cap and all cases involving alternative (non-Arbitron) showings that cannot be clearly and unambiguously resolved, will be referred to the full Commission until such time as applicable precedents have been established. *Memorandum Opinion and Order*, 7 FCC Rcd at 6400 n.78. For the reasons set forth in the text, we find that Four Seasons has failed to present a *bona fide* issue as to compliance with the Commission's 25 percent audience share limit and, therefore, action by the full Commission is not required.

[8] On May 4, 1993, an informal objection was filed by Robert C. King, Jr., Vice President of Richmond Motor Company, Inc. The objection reiterates Four Seasons' concerns about excessive concentration of control in the market and contends that it would not be in the best interest of the public for these assignment applications to be granted. Additionally, Mr. King contends that allowing licensees to own 2 same service stations in a market will result in higher advertising rates and increased unemployment. In light of the foregoing, the informal objection is denied.

ARE HEREBY DENIED. Additionally, the applications for consent to assign the licenses of WRNL(AM) and WRXL(FM), Richmond, Virginia, from Capitol Broadcasting Company of Virginia, Inc. to Clear Channel Radio Licenses, Inc. (file nos. BAPL-930226GE and BALH-930226GF) ARE HEREBY GRANTED.

Sincerely,

Larry D. Eads, Chief
Audio Services Division
Mass Media Bureau

cc: Robert C. King, Jr.

Before the
Federal Communications Commission
Washington, D.C. 20554

In re Application

Great Lakes of Iowa, Inc. File No. 07488-CL-MP-92

For Modification to Authorization for Domestic Public Cellular Telecommunications Service on Frequency Block A in Market No. 426A, Iowa 15 - Dickinson RSA

MEMORANDUM OPINION AND ORDER ON RECONSIDERATION

Adopted: August 10, 1993; Released: August 18, 1993

By the Acting Chief, Common Carrier Bureau:

I. INTRODUCTION

1. In this order, we address a Petition for Reconsideration (Petition) filed by Excellence II (Excellence) requesting that the Common Carrier Bureau reconsider a Mobile Services Division (MSD) action which denied Excellence's Petition to Deny an application filed by Great Lakes of Iowa, Inc. (Great Lakes) and contemporaneously granted Great Lakes's application. *See* Letter to D. Moline and L. Young from Chief, MSD (Dec. 30, 1992) (*MSD Letter*). Great Lakes filed an opposition to the Petition. For the reasons discussed below, we deny Excellence's Petition.

II. BACKGROUND

2. Great Lakes is the cellular Block A licensee for the Iowa 15 - Dickinson Rural Service Area (Dickinson RSA), and Excellence is the cellular Block A tentative selectee in the adjacent Iowa 16 - Lyon RSA (Lyon RSA). Great Lakes filed the captioned application seeking modifications which would result in a 39 dBu contour extending beyond the Dickinson RSA and into the Lyon RSA. Excellence filed its Petition, arguing that Great Lakes's proposed contour did not conform to the Commission's policies because the actual extensions by Great Lakes's two proposed cells would be much greater than *de minimis* extensions based upon a 32 dBu contour. Great Lakes had opposed Excellence's petition to deny.

3. The *MSD Letter* denied Excellence's Petition to Deny Great Lakes's application. The MSD stated that Great Lakes's proposal must be considered based on 39 dBu contours and not on 32 dBu contours because the criteria for 32 dBu coverage did not become effective until July 16, 1992, the day after Great Lakes filed its application. *Id* at 1.[1] Moreover, the *MSD Letter* concluded that Great Lakes's proposed extension is relatively small in size, that Great Lakes explained that some extension was unavoidable, that the extension did not cover any populated areas or any well-travelled roadways, that the cells were designed to ensure maximum coverage of several roadways within the Dickinson RSA, and that a directional antenna was proposed at one of Great Lakes's proposed cells to minimize the extension from that site. *Id* at 2. Consequently, the MSD found that any coverage Great Lakes proposed in the extension area was incidental and *de minimis*, and, as a result, the MSD denied Excellence's Petition to Deny and granted Great Lakes's application.

III. EXCELLENCE'S PETITION

4. In its Petition for Reconsideration, Excellence argues that Great Lakes did not provide enough proof that its proposed modification satisfied the Commission's *de minimis* extension standards. Citing *Advanced Mobile Phone Services, Inc.*, 54 Rad. Reg. 2d (P&F) 260 (Com. Car. Bur. 1983) (*AMPS*), Excellence argues that Great Lakes had the initial burden of showing that its proposed extension is necessary to provide reliable service to some portion of the Dickinson RSA but that Great Lakes failed to offer such proof. Excellence claims that the MSD did not properly analyze Great Lakes's proposal because the *MSD Letter* failed to recognize that Great Lakes did not meet the threshold showing that the extension is necessary to serve some identified part of the applicant's own market. Excellence asserts that the MSD focused solely upon the size of the extension and apparently overlooked its argument that Great Lakes did not provide compelling justification to support the extension.

5. In response, Great Lakes contends that the MSD correctly found that Great Lakes did provide enough explanation to satisfy the burden-of-proof requirement for a *de minimis* extension, notwithstanding Excellence's arguments to the contrary. It argues that Excellence's claims are groundless and without merit. Moreover, it contends that the record evidence was clear and that the MSD properly weighed that evidence.

IV. DISCUSSION

6. Section 22.903(d)(1) of the Commission's Rules, in relevant part, provides that SABs may extend into adjacent Metropolitan Statistical Areas (MSAs) or RSAs if they are *de minimis* and are demonstrably unavoidable for technical reasons of sound engineering design. The physical extent of an affected geographic area is only one consideration in determining whether a Cellular Geographic Service Area extension is *de minimis* and is not the most important

[1] Although the *MSD Letter* referred to field-strength contours, extensions are now defined in terms of the Service Area Boundary (SAB) rather than field-strength contours. *See Amendment of Part 22 of the Commission's Rules to provide for filing and processing of applications for unserved areas in the Cellular Service and to modify other cellular rules* in CC Docket No. 90-6, *Second Report and Order*, 7 FCC Rcd 2449 (1992), *modified on reconsideration*, 8 FCC Rcd 1363 (1993). The MSD's apparent oversight referencing field-strength contours instead of the SAB is not of decisional significance.

consideration. *See AMPS* at 54 Rad. Reg. 2d (P&F) 266.[2] "Any extension beyond the [MSA or the RSA] is to be avoided; if an extension is proposed, it must be justified." *Id.* at 267. Simply put, "[a] *de minimis* [SAB] extension is a relatively small overlap of the contour into a neighboring market which is necessary for engineering reasons to serve adequately the area within the contour located inside the market of the licensee who proposes the extension."[3]

7. Contrary to Excellence's arguments, we find that the record supports the finding that Great Lakes met its burden of proof in establishing that Great Lakes's proposed extensions were unavoidably necessary. Great Lakes's application specifically set forth the purpose for each of its proposed additional cell sites, clearly demonstrating that the additions were necessary to provide much-needed service to well-travelled highways within the Dickinson RSA. The highways were specifically identified by number for each cell proposal and were identified on the map accompanying the engineering statement. Additionally, Great Lakes certified in its engineering statement that no major population centers or well-travelled highways into the Lyon RSA would be affected by the extensions. Further, Great Lakes proposed to use a directional antenna for one of the cells assertedly to demonstrate a good-faith attempt to minimize the extent of its incursion into the Lyon RSA. Excellence has not shown any of Great Lakes's statements to be inaccurate.

8. We further find that, notwithstanding Excellence's assertions, the MSD correctly considered all of the requisite and appropriate factors in determining whether Great Lakes's extension was *de minimis* and did not focus solely on the size of the overlap in determining whether the extension was *de minimis*.[4] In addition to citing the small area of overlap caused by Great Lakes's proposal, the MSD evaluated Great Lakes's explanation concerning the need for the extension, that the extension does not cover any populated areas or any well-travelled roadways within the Lyon RSA, that the proposed new cells are designed to ensure maximum coverage of several roadways within the Dickinson RSA, and that a directional antenna was proposed at one of the cells to minimize the extension from that site. Equally significantly, the MSD evaluated Great Lakes's explanation that the extension was unavoidable. As a result, the *MSD Letter* accounted for all of the appropriate factors, specifically finding that Great Lakes's proposal was justified, in determining whether the extension was *de minimis*. Consequently, we conclude that the MSD acted properly.

V. CONCLUSION AND ORDERING CLAUSE

9. For the reasons set forth in this order, we affirm the MSD's denial of Excellence II's Petition and the grant of Great Lakes's application.

10. Accordingly, IT IS ORDERED that the Petition for Reconsideration filed by Excellence II in the above-captioned proceeding IS DENIED.

FEDERAL COMMUNICATIONS COMMISSION

Kathleen B. Levitz
Acting Chief, Common Carrier Bureau

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[2] *AMPS* pointed out that in *Public Notice, Cellular Application Filing Procedures,* Mimeo No. 2973, released Mar. 24, 1982, the Commission said that no rigid rule of determination would apply. Rather, the characterization of an extension as *de minimis* would depend upon an analysis of the particular circumstances in each case. *AMPS* also stated that this *Public Notice* suggested that size of geographical area affected, avoidance of interference conflicts, and public interest concerns are among the circumstances to be considered. *AMPS* added that subsequent orders developed still further this *ad hoc* determination process. 54 Rad. Reg. 2d (P&F) at 266 (citations omitted).

[3] *Amendment of Part 22 of the Commission's Rules to provide for filing and processing of applications for unserved areas in the Cellular Service and to modify other cellular rules* in CC Docket No. 90-6, *First Report and Order and Memorandum Opinion and Order on Reconsideration,* 6 FCC Rcd 6185 at n.23 (1991).

[4] We also note that the *MSD Letter* referenced the proper *de minimis* extension standard, that:

> ... [SAB] extensions are permitted if the extension is *de minimis* and the applicant provides an adequate engineering showing as to why the extension is necessary. *See Procedures Update,* 52 Rad. Reg. 2d (P&F) 725, 726 (1982), *aff'd, Cellular Radio Service,* 56 Rad. Reg. 2d (P&F) 1583, 1587-88 (1984); Sections 22.903(a) and 22.923(c)(1) of the Commission's Rules. In evaluating the explanation, we consider such factors as the population and terrain of the area involved, the shape of adjoining boundaries, and any special engineering considerations. *See, e.g., Saco River Cellular Telephone Company,* 2 FCC Rcd 2009 (Mobile Serv. Div. 1987).

MSD Letter at 1.

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 90-254

In re Applications of

SHORT BROADCASTING CO., INC. File No. BPH-880504MI

THREE RIVERS RADIO COMPANY File No. BPH-880505NF

For Construction Permit for
New FM Station, Channel 271A,
Phoenix, New York

Appearances

Jerrold Miller, Esq. on behalf of Short Broadcasting Co., Inc.; *Donald E. Martin, Esq.* and *Barbara R. Merlie, Esq.* on behalf of Three Rivers Radio Company; and *Thomas J. Hutton, Esq.* on behalf of Broadcast Capital Fund, Inc. and Broadcast Capital Inc., *Amicus Curiae.*

DECISION

Adopted: August 10, 1993; Released: August 19, 1993

By the Review Board: MARINO (Chairman), BLUMENTHAL, and GREENE.

Board Chairman MARINO:

1. This proceeding currently involves the competing applications of Short Broadcasting Co., Inc. (Short) and Three Rivers Radio Company (Three Rivers) for authority to construct a new FM station in Phoenix, New York. Pursuant to *Hearing Designation Order,* DA 90-676, released June 4, 1990, the case was set for hearing on the standard comparative issue. Thereafter, by *Memorandum Opinion and Order,* FCC 91M-1706, released May 24, 1991, the Presiding Judge added the following issues:

> c) To determine whether Robert D. Short, Jr., (now, Short Broadcasting Co., Inc.) is financially qualified.
>
> d) To determine whether Short Broadcasting Co., Inc. misrepresented or lacked candor when it certified that it was financially qualified.
>
> e) To determine whether Short Broadcasting violated Section 1.65 of the Commission's rules by failing to report the proposed issuance of warrants in the ownership structure of the proposed facility.
>
> f) To determine, in light of the evidence adduced pursuant to the above identified issues, whether Short Broadcasting is qualified to be a Commission licensee.

And, by *Memorandum Opinion and Order,* FCC 91M-2772, released September 12, 1991, the Presiding Judge added the following issue:

> g) To determine whether Three Rivers had reasonable assurance of sufficient funds to construct and operate its proposed station for three months without revenue at the time it filed its application.

2. In an *Initial Decision* (I.D.), FCC 92D-60, released October 5, 1992, presiding Administrative Law Judge Edward Luton (ALJ) found that both Short and Three Rivers were not financially qualified and that, accordingly, both applications must be denied. I.D., ¶ 114. The ALJ resolved the misrepresentation and Rule 1.65 issues favorably to Short. In view of the disqualification of both applicants, the ALJ made comparative findings and conclusions, but did not declare a comparative winner. The proceeding is now before the Review Board on exceptions of both applicants to their respective disqualifications. In addition, we have before us a motion for leave to file brief *amicus curiae* and accompanying brief submitted by Broadcast Capital Fund, Inc. and Broadcast Capital, Inc. (Broadcap). Broadcap's interest is that it is the source of the financing letter relied on by Short in this proceeding which was rejected by the ALJ. Consistent with past Commission practice, we agree that it would be helpful to consider the amicus's views on this issue. *See Salt City Communications, Inc.,* 8 FCC Rcd 683 (1993) (amicus briefs of MBIC and NAACP accepted on identical financing issue.) We have reviewed the I.D. in light of these pleadings and the underlying record and conclude that Three Rivers' application was properly denied but that Short is financially qualified and must therefore be granted. No exceptions having been taken to the ALJ's favorable resolution of the misrepresentation and reporting issues regarding Short, no further comment on those issues is appropriate. *See* 47 CFR 1.277(a). It is also unnecessary, in view of the result reached herein, to further review the applicants' comparative qualifications. *See* 47 CFR 1.282(b).

Short's Financial Qualifications

3. As noted, Short relies on financing from Broadcap and, more specifically, on the following letter, dated April 29, 1988, from Raymond Suarez, Broadcap's vice president, to Robert D. Short, Jr., who is the sole voting stockholder of the applicant (I.D., ¶ 59; Short Financial Exh. 1, Att. A, pp. 14-15):

> We understand that you are seeking FCC approval to operate a Class A, FM frequency on channel 271A, licensed to Phoenix, New York. The purpose of this letter is to advise you that Broadcast Capital, Inc. (BROADCAP) has reviewed your request for a loan to cover construction and working capital requirements for the station. Based upon that review we are willing, in principle, to lend you up to $250,000 subject to approval by BROADCAP's Board of Directors for the above purposes, provided that the following conditions are met:

> 1. You are successful in obtaining approval from the FCC to operate the station; and
>
> 2. All reasonable and ordinary credit criteria of BROADCAP are met at such time as you (a) receive such approval; (b) request a formal lending commitment from BROADCAP; and (c) execute all customary documentation normally required by BROADCAP.
>
> While the pricing and terms of the amortization of the loan will be contingent upon the exact credit conditions prevailing at the time the loan is extended, at present we would intend to calculate interest at twelve percent (12%) with a stock warrant interest of up to 30%. Any loan made will be repaid over a ten year period, interest only for the first three years with principal and interest payments beginning in the fourth year. The loan will be collaterized with the assets of the station (and may be further secured by corporate and/or personal guarantees of shareholders).
>
> While this letter is not intended as a binding legal commitment from BROADCAP, it is inteded to provide reasonable assurance that these funds will be made available on terms stated for the purpose of operating the station subject to our Board's approval.
>
> We look forward to working with you in connection with this venture.

4. Prior to obtaining this commitment letter, Mr. Short had several conversations with Suarez, whom he had previously met in connection with another broadcast application in Syracuse, New York. At Suarez's request, Short submitted to Broadcap an eleven page business plan which included, *inter alia*, a description of the proposed facility, a market analysis, a competition analysis, earnings projections over five years, demographic information, and an operating budget. I.D., ¶ ¶ 56-58; Short Financial Exh. 1.

5. On May 2, 1991, John Oxendine, Broadcap's president, authored a letter repeating Broadcap's commitment to Short. This letter differed from the 1988 letter only in that it increased the previous commitment to $400,000. I.D., ¶ 68. On August 1, 1991, Oxendine again reaffirmed the commitment to Short and, in response to Short's concerns about the stock warrants requirement, offered the following modification (*Id.* at ¶ 69; Short Financial Exh. 1, Att. A, p. 21):

> With regard to the stock warrants issued in connection with BROADCAP's loan, we are prepared to include a provision permitting Short Broadcasting Company, Inc. to redeem BROADCAP's stock warrants prior to their exercise at a negotiated price which will provide BROADCAP with a fair return on its investment.

In writing the May 2nd and August 1st letters, Oxendine explained that he had in mind (Tr. 258):

> ... obtaining a financial interest in the entity, not stock. That is why stock warrant as opposed to stock, because I could have gotten stock had I wanted to, but, I wanted a financial interest and the way to get it was through a stock warrant. And over the years the only time I exercise a stock purchase warrant is to obtain the financial interest that we negotiated at the beginning of the investment opportunity. Voting and non-voting is significant to the extent that if financing becomes a problem, and we have to exercise our stock warrants so that we can become a voting stockholder, it is mainly so that we might be able to protect our interest. We have never had the occasion to do that, to the best of my recollection over 10 years.
>
> So it is a financial interest that is represented by the stock warrant. It is the primary purpose of this, in our financing documents.

6. Upon review of the evidence summarized above, the ALJ, relying on *Scioto Broadcasters Limited Partnership*, 5 FCC Rcd 5158 (Rev Bd. 1990) and *Welch Communications, Inc.*, 7 FCC Rcd 4542 (Rev. Bd. 1992), held that reasonable assurance of financing had not been provided. He noted that Mr. Short did not have a "long and established" relationship with Broadcap, and had not provided Broadcap with any financial information about himself. Because, in his view, the 1988 financing letter "was issued without a serious and considered assessment of the pertinent circumstances", the ALJ concluded that it was a worthless accommodation. We disagree.

7. In assessing whether a commitment letter provides reasonable assurance of a loan, the Commission generally considers whether the borrower's qualifications have been preliminarily reviewed by the lender, whether adequate collateral has been demonstrated, and whether the tentative terms are specifically identified and acceptable to the lender as well as the borrower. *Liberty Productions, A Limited Partnership*, 7 FCC Rcd 7581, 7584 (1992). These standards apply equally whether the lender is a minority enterprise small business investment company (MESBIC) such as Broadcap or a conventional financial institution such as a bank. *Salt City*, 8 FCC Rcd at 687.

8. Here, the Commission's reqirements were satisfied even if we accept the ALJ's view that Short's previous contact with Suarez in connection with another application did not amount to a long-standing relationship with Broadcap. *See Scioto*, 5 FCC Rcd at 5160. Short provided sufficient information about itself and its plans to satisfy Broadcap and Short understood and accepted Broadcap's terms. Specifically, prior to issuance of the April 1988 letter, Mr. Short discussed his plans for the station with Suarez, indicated how much money the applicant would need, and satisfied Suarez' request for the submission of a written business plan which included detailed information about the market, the facility, and the applicant. Although the ALJ was concerned that Mr. Short did not provide Suarez with personal financial data, it is clear from the record that, on more than one occasion, Short offered such information, but Broadcap rejected it because, consistent with its standard procedure for analyzing a broadcast venture, it was principally concerned with evaluating the viability of the station in the market. *See* I.D., ¶ ¶ 56-57; Short Financial Exh. 1, pp. 2-3; Financial Exh. 3, pp. 10-11; tr. 283-5, 287-8.

9. In accordance with *Liberty*, 7 FCC Rcd at 7584, and *Scioto*, 5 FCC Rcd at 5160, the April 1988 letter specifically identified the tentative terms including the amount of the loan, its purpose, the interest rate, repayment period, and collateral. That Broadcap increased the amount of funds it was willing to advance in the May 1991 letter only reflected its evaluation of the market conditions and investment potential at that time, *see* tr. 241-44, and in no way undermined the original commitment. And the modification of the warrants provision in the August 1991 letter to allow Short to redeem them was also made in the context of reaffirming the original commitment and was in response to Short's expressed concerns. In sum, none of the cirumstances herein suggest that the 1988 commitment letter was a mere accommodation letter. Finally, *Welch*, cited by the ALJ, wherein the Board rejected an applicant's reliance on financing from Broadcap for a proposed station in Swanton, Ohio, was reversed by the Commission subsequent to release of the I.D. *See Welch Communications, Inc.*, 8 FCC Rcd 1285 (1993). The *Welch* Commission concluded that Broadcap's independent determination that the Swanton market was sufficiently viable to enable it to provide a $250,000 loan, irrespective of the personal financial circumstances of the applicant, together with the fact that the applicant had done everything required of a borrower to obtain a loan from Broadcap, were enough to establish reasonable assurance of financing. *Id.* at 1285-1286. No less can be said here.

Three Rivers' Financial Qualifications

10. Three Rivers is a sole proprietorship owned by Linda Deeb. Deeb estimates that it will cost in the range of $150,000 to $170,000 to construct and operate the station for three months. I.D., ¶ 84. To meet these costs, Deeb relies on the promise of her husband, Douglas Deeb, to make the money available to her as a gift. Douglas Deeb, in turn, proposed to obtain the necessary funds from his aunt, Elizabeth Thygesen, and so informed his wife. Mr. Deeb's belief was premised on the fact that on two previous occasions, in 1977 and approximately 1984-1985, he had sought or inquired about seeking a loan of $100,000 from his aunt for a business venture, and been assured by her that the money would be available whenever he needed it. He testified that in 1977 he saw some of his aunt's financial records which led him to believe she could fulfill her promise to him. *Id.* at ¶ ¶ 87-88; Three Rivers Exhs. 10, 11. Accordingly, when his wife discussed with him her financial needs in connection with the proposal, he asked his aunt if she would be willing to provide a gift, without cost or interest, of up to $200,000 for a business purpose, and she agreed to do so. I.D., ¶ 89. Mrs. Deeb did not speak to Mrs. Thygesen directly but was assured by her husband that his aunt had the necessary funds to finance the project. Tr. 432-33. Mrs. Thygesen died in Sepember 1989, prior to the hearing, and there is no documentary evidence in the record to reflect her financial wherewithal at the time the Three Rivers application was filed in 1988, but probate documents indicate that her estate consisted of approximately $316,000 in net liquid assets at the time of her death and that one-third of the estate is bequeathed to Douglas Deeb. I.D., ¶ 91; Three Rivers Exh. 11, Att. 1.

11. The ALJ concluded that because Mr. Deeb had not seen any current financial information relating to Mrs. Thygesen at the time of certification and had no specific knowledge of her financial condition, he had no objective basis for believing that she was capable of giving him the money he was seeking. Nor, the ALJ found, did the applicant's principal, Linda Deeb, have any personal knowledge of Mrs. Thygesen's financial status. He therefore concluded that Three Rivers did not have reasonable assurance of the necessary funds. *Id.* at ¶ ¶ 103-104. In its exceptions, Three Rivers argues that it had reasonable assurance of financing, in accordance with the Commission requirements set forth in *Northampton Media Associates*, 4 FCC Rcd 5517 (1989), because both Linda Deeb and her husband were familiar with his aunt's financial status at the time of certification. While it concedes that Mrs. Deeb did not see any written documentation of Mrs. Thygesen's assets at the time and that it did not, as required by *Northampton*, provide a balance sheet from Mrs. Thygesen demonstrating her financial capability, it nevertheless argues that it attempted to introduce bank statements showing her assets and that the ALJ erred by rejecting its petition to reopen the record to receive such evidence. *See Order*, FCC 92M-538, released May 11, 1992. We affirm the ALJ's rulings.

12. In requiring applicants to demonstrate reasonable assurance of the financial ability to construct and operate their proposed stations for three months, the Commission has made clear that where an applicant relies on a funding source other than a lending institution, such as an individual, it "must demonstrate that it has taken the necessary steps to ascertain that [the source] has sufficient financial resources to meet the... commitment at the time of certification", and, furthermore, in this regard, "that reliance on the self-serving statement of the individual responsible for the certification that he took the appropriate steps to secure the needed funds would not be sufficient." *Aspen FM, Inc.*, 6 FCC Rcd 1602, 1603 (1991); *accord, Texas Communications Limited Partnership*, 7 FCC Rcd 3186, 3187 (1992). In addition, the applicant must have a commitment from its financing source demonstrating a "firm intention" to make the funds available for the construction and operation of the proposed station. *Swan Broadcasting Limited*, 8 FCC Rcd 4208, 4210 (1993); *accord, Peter Joseph Devlin and Patricia Eve Devlin*, 7 FCC Rcd 2499 (Rev. Bd. 1992) (sufficient dialogue to establish "present firm intention" to lend funds is necessary), citing *Merrimack Valley Broadcasting, Inc.*, 82 FCC 2d 166, 167 (1980). Finally, in order to establish the availability of such funds, the applicant must also provide "substantial and reliable evidence," such as a balance sheet, financial statement, or other documentary evidence, showing that, at the time of certification, its source had sufficient net liquid assets to advance the funds needed. *Northampton*, 4 FCC Rcd at 5519. Three Rivers' evidentiary showing fails woefully to meet these bedrock criteria.

13. To begin with, and fundamentally in this case, although Three Rivers' principal Linda Deeb relies exclusively on a purported gift to be relayed to her by her husband from his aunt, Mrs. Thygesen, to finance the application, Linda Deeb did not at the time of certification have any knowledge of Mrs. Thygesen's financial wherewithal. Not only did Mrs. Deeb have no specific information regarding Mrs. Thygesen's net liquidity, she had never even spoken with her concerning the application or her supposed gift, even though she was the applicant's sole funding source. Thus, there was no dialogue between Mrs. Deeb and Mrs. Thygesen, let alone an understanding of any sort, that would establish that Mrs. Thygesen had a firm intention to advance the substantial funds the applicant

needed. As was identically the case in *Texas Communications,* where the general partner who made the financial certification unsuccessfully relied on the claimed oral promise of the limited partner to provide the necessary funds, Mrs. Deeb "never reviewed a financial statement in order to determine [her source's] ability to provide financing and she had no personal knowledge of [the source's] assets and liabilities." 7 FCC Rcd at 3187. Although Three Rivers relies heavily on the assurances of Linda Deeb's husband that the funds would be available from his aunt, at the time of certification Douglas Deeb had not seen any financial information regarding Mrs. Thygesen in over a decade and he too had no specific current knowledge of her assets and liabilities. Nor did he even inform his aunt of the specifc use for which the $200,000 was intended. The vagueness and unreliability of the applicant's proposal is further underscored by the fact that Mrs. Thygesen's will, executed two weeks after Three Rivers' application was filed, bequeathed one-third of her estate -- approximately $105,000 -- to Douglas Deeb, which is only half the amount he claims to have secured from her for his wife's application and significantly less than the $150,000 to $170,000 estimated by the applicant as minimally required to meet its costs. *See* Three Rivers Exh. 11, Att. 1.

14. Three Rivers' efforts to factually distinguish *Aspen FM* and to analogize its certification to the one approved in *Northampton* are unpersuasive. In *Aspen FM,* similar to the situation here, the certifying principal had not seen any financial information evidencing the non-voting stockholder's financial ability to meet his purported commitment to the applicant at the time she certified the application, and she relied solely on second-hand information as to his financial wherewithal. 6 FCC Rcd at 1603. And in *Northampton,* the individual certifying the application, unlike Mrs. Deeb, had actual personal knowledge of the lender's financial worth. 4 FCC Rcd at 5518. *Port Huron Family Radio, Inc.,* 5 FCC Rcd 4562 (1990), also relied on by Three Rivers, is distinguishable because, *inter alia,* the certifying principal had discussed the lender's financial ability with his former accountant and received assurances that he had the financial means to make the loan. And *Pleasant Hope Broadcasting Co., L.P.,* 6 FCC Rcd 6353 (Rev. Bd. 1991), also cited by Three Rivers, is unhelpful because there the applicant's principal specifically requested and received assurance from the lending bank's highest loan officer, who was personally familiar with the proposal, that sufficient funds would be available. 6 FCC Rcd at 6556. In any event, *Pleasant Hope*'s precedential value is at least doubtful in view of the subsequent Commission action (by its Office of General Counsel) approving a settlement and vacating the opinion below. *See Order,* FCC 92I-3, released January 9, 1992; *but compare Atlantic City Community Broadcasting, Inc.,* 8 FCC Rcd 4520, 4523 at ¶ 16 (1993) (relying on *Susan M. Mulkey,* 4 FCC Rcd 5520 (1989), *settled and vacated,* 6 FCC Rcd 1814 (1991)).

15. In view of Three Rivers' utter failure to ascertain that Mrs. Thygesen had the financial means to provide the funds it sought at the time of certification and the absence of objective evidence that Mrs. Thygesen had agreed to make a gift of $200,000 for the broadcast proposal, we conclude that the applicant did not meet the Commission's reasonable assurance standards. *See Texas Communications,* 7 FCC Rcd at 3187; *Northampton,* 4 FCC Rcd at 5518. It is therefore unnecessary to formally rule on Three Rivers' exception that the ALJ should have permitted it to reopen the record to introduce new evidence that Mrs. Thygesen had sufficient net liquid assets to advance the necessary funds because such evidence would not cure its defective certification.

16. Nevertheless, we are inclined to agree with the ALJ that Three Rivers did not satisfy the Commission's requirement that there must be a particularly strong showing to justify a post-hearing motion to reopen the record. An applicant in Three Rivers' procedural posture must show: (1) that it relies on newly discovered evidence that could not, through the exercise of due diligence, have been discovered earlier; and (2) that the new evidence, if true, would affect the outcome of the proceeding. *Eve Ackerman,* 8 FCC Rcd 4205 (1993). The evidence Three Rivers sought to introduce were account summaries for investment and savings accounts held by Mrs. Thygesen. Although Three Rivers attributed its delay in obtaining the accounts to Mrs. Thygesen's death and the bank's consequent slowness in releasing the information, it appears that four of the five accounts were jointly held with other family members and no sufficient reason was offered as to why the surviving account holders could not have obtained summaries of their accounts at the time of the hearing. *See* FCC 92M-538, ¶ 2. Moreover, as already indicated, the account summaries could not substitute for evidence of a firm intention on Mrs. Thygesen's part to make a $200,000 gift to her nephew so that he could provide that sum to his wife for purposes of her broadcast proposal.

17. ACCORDINGLY, IT IS ORDERED, That the Motion for Leave to File Brief *Amicus Curiae,* filed November 4, 1992, by Broadcast Capital Fund, Inc. and Broadcast Capital, Inc., IS GRANTED, and the attached Brief *Amicus Curiae* IS ACCEPTED; and

18. IT IS FURTHER ORDERED, That the application of Short Broadcasting Co., Inc. (File No. BPH-880504MI) for a construction permit for a new FM station in Phoenix, New York IS GRANTED, and the application of Three Rivers Radio Company (File No. BPH-880505NF) IS DENIED.

FEDERAL COMMUNICATIONS COMMISSION

Joseph A. Marino
Chairman, Review Board

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 87-119

In re Applications of

BREEZE BROADCASTING COMPANY, LTD.	File No. BPH-840503IC
MARANATHA BROADCASTING COMPANY, INC.	File No. BPH-850712ME
J. McCARTHY MILLER	File No. BPH-850712NT

For Construction Permit for
New FM Station, Channel 237A,
Gulf Breeze, Florida

Appearances

Barry D. Wood and *Ronald D. Maines*, on behalf of Breeze Broadcasting Company, Ltd.; *J. Geoffrey Bentley* and *Jesse A. Halvorsen*, on behalf of Maranatha Broadcasting Company, Inc.; and *Donald J. Evans, Pamela C. Cooper*, and *Carole A. Evans*, on behalf of J. McCarthy Miller.

DECISION

Adopted: August 10, 1993; Released: August 19, 1993

By the Review Board: MARINO (Chairman) and BLUMENTHAL.[1]

Board Chairman MARINO:

1. This proceeding returns once more to the Review Board on: (1) the *Initial Decision*, 5 FCC Rcd 26 (1990), of Administrative Law Judge Joseph P. Gonzales (ALJ), which granted the application of Breeze Broadcasting Company, Ltd. (Breeze) for a new commercial FM broadcast station at Gulf Breeze, Florida; (2) a *Supplemental Initial Decision*, 7 FCC Rcd 1653 (1992), which disqualified J. McCarthy Miller (Miller) following a remand of the proceeding for further hearing on Miller's financial qualifications; and (3) exceptions and replies filed by Maranatha Broadcasting Company, Inc. (Maranatha), Miller, and Breeze.

2. In a *Memorandum Opinion and Order*, 8 FCC Rcd 1835 (Rev. Bd. 1993), the Board treated all of the decisional exceptions including those filed by Gulf Breeze Broadcasting Co. (Gulf Breeze), then an applicant in this proceeding. We affirmed the ALJ's disqualification of Miller and found that Gulf Breeze was the superior comparative applicant. Because a substantial and material question of fact had been raised against one of Gulf Breeze's principals, however, a second remand of the case was required on a misrepresentation issue against Gulf Breeze. Once the case was before the ALJ, Breeze and Gulf Breeze promptly reached a settlement whereby Gulf Breeze agreed to dismiss its application in return for monetary consideration, thus mooting the remand hearing. By *Memorandum Opinion and Order*, FCC 93M-475, released July 19, 1993, the ALJ approved the agreement, dismissed Gulf Breeze's application, and referred the proceeding back to the Board.

3. At the outset, we incorporate by reference our prior *Order*. *See Shawn Phalen*, 7 FCC Rcd 3122 (Rev. Bd. 1992) (previous conclusions incorporated into *Order* to allow parties to file application for review with full Commission). In addition to affirming Miller's disqualification on the financial qualifications issue, *see* 8 FCC Rcd at 1836-1838 ¶ ¶ 4-15, our *Order* diminished Breeze's quantitative integration credit to fifty percent after attributing to the applicant the fifty percent equity interests of its two non-integrated limited partners, Houston L. and Voncile R. Pearce, *id.* at 1838-1839 ¶ ¶ 16-20. The *Order* further assessed Breeze a diversification demerit relative to Gulf Breeze, which had no media interests, for the limited partners' media interests. *Id.* at 1840 ¶ 25. We also denied an exception that a financial issue should have been added against Breeze. *Id.* at ¶ ¶ 26-27. With respect to Maranatha, the *Order* noted merely that that applicant proposed no integration credit and had been assessed a diversification demerit by the ALJ for ownership interests in five broadcast facilities. *Id.* at 1835 ¶ 2.

4. With the dismissal of the Gulf Breeze application from the proceeding, the only undecided question remaining before the Board is whether Breeze or Maranatha is the superior comparative applicant. In this regard, we have already awarded Breeze fifty percent quantitative integration credit versus no credit for Maranatha. 8 FCC Rcd at 1840 ¶ 25. This entitles Breeze to a moderate integration preference. *See Communications Properties, Inc.*, 92 FCC 2d 45, 48-49 ¶ 9 (Rev. Bd. 1982), *review denied*, FCC 83-320, released July 7, 1983; *Hassayampa Broadcasting*, 92 FCC 2d 472 (Rev. Bd. 1982), *review denied*, FCC 83-295, released June 28, 1983. Additionally, Breeze received from the ALJ a very slight coverage preference over Maranatha for proposing to serve 5.45% more people, but recent precedent suggests that where, as here, all of the population is already well served, *i.e.*, five or more services, such a minor population disparity merits no preference. *See, e.g., Beach Broadcasting Limited Partnership*, 6 FCC Rcd 4485, 4485 ¶ ¶ 3-4 (1991). On the final criterion, *i.e.*, diversification, both applicants have multiple media interests, *compare Initial Decision*, 5 FCC Rcd 29 ¶ ¶ 29-30, 33 *with* 5 FCC Rcd at 27 ¶ 16, which interests we find generally offset one another and warrant no preference.[2] Maranatha, itself, apparently concedes that it can prevail only if Breeze is

[1] Former Board Member Eric T. Esbensen participated in the earlier phase of this proceeding and at oral argument held on June 1, 1990.

[2] Breeze has slightly more stations than Maranatha, seven versus five, and its facilities are closer to Gulf Breeze than those of Maranatha, but the individual through whom the interests are attributable to Breeze, Houston Pearce, has no more than a fifty percent ownership interest in any of the licensees. His wife is an officer of certain of the licensees but has no ownership interests. In contrast, Maranatha wholly owns five facilities and

denied its quantitative integration credit, *see* Maranatha Br. at 2, 12. Thus, we conclude that a grant to Breeze better comports with Commission precedent.

5. ACCORDINGLY, IT IS ORDERED, That the application of Breeze Broadcasting Company, Ltd. (File No. BPH-840503IC) for a construction permit for a new FM station at Gulf Breeze, Florida, IS GRANTED; and that the applications of Maranatha Broadcasting Company, Inc. (File No. BPH-850712ME) and J. McCarthy Miller (File No. BPH-850712NT) ARE DENIED.

FEDERAL COMMUNICATIONS COMMISSION

Joseph A. Marino
Chairman, Review Board

its president is also an officer and director of yet another facility, non-commercial educational station WBMR-FM, Telford, Pennsylvania, as well as the president and sole shareholder of Lehigh Valley Mobile Telephone Company, the tentative selectee for a construction permit for a new multichannel multipoint distribution service system at Atlantic City, New Jersey. *See Policy Statement on Comparative Broadcast Hearings,* 1 FCC 2d 393, 395 (1965)(interests considered more significant, *inter alia,* in the degree that they go towards complete ownership and control; are close to the community of license; and are significant in terms of numbers and size); *Cf. Ottumwa Broadcasting Co.,* 92 FCC 2d 1011, 1013-1014 ¶ ¶ 4-5 (Rev. Bd. 1982)(greater ownership percentage cancels out greater number of facilities). Breeze's twenty-five percent general partner, William Phillips, also has an interest in two Alabama stations but committed himself to divest his interests, which divestiture pledge the ALJ credited. 5 FCC Rcd at 28 ¶ 26. Maranatha speculates that Phillips may not be able to divest himself of the media interests but the evidence fails to seriously call into question his divestiture pledge.

Before the
Federal Communications Commission
Washington, D.C. 20554

In re Application of:

NIKITA MAGGOS File No. 7619-CM-P-83

For Authority to Construct and
Operate a Station in the Multichannel
Multipoint Distribution Service on
E-Group Channel in Macoupin County, Ill.

ORDER ON RECONSIDERATION

Adopted: July 30, 1993; Released: August 18, 1993

By the Chief, Domestic Facilities Division:

1. *Introduction.* Nikita Maggos (Maggos) filed a petition for reconsideration of the dismissal by the Domestic Facilities Division (Division) on delegated authority of his application for authority to construct and operate a Multichannel Multipoint Distribution Service (MMDS) station on the E-group channels in Macoupin County, Illinois, and requested reinstatement of his application.

2. *Background.* During its preparation for the random selection procedure to choose among E-group applicants for the St. Louis, Missouri Metropolitan Statistical Area (St. Louis MSA), the staff discovered that Maggos had filed two applications within or within 15 miles of the border of the St. Louis MSA. Thus, both applications were subject to dismissal for violation of the one-to-a-market rule, Section 21.901(d)(2).[1] By letter, the staff requested that Maggos choose between the two applications (File No. 7619-CM-P-83 in Macoupin County, Illinois and File No. 7625-CM-P-83 in St. Louis, Missouri). Maggos requested an extension of time to respond to the letter. Subsequently, Maggos filed a *Notice of Amendment and Petition for Waiver.* Prior to consideration of the Maggos amendment and waiver petition, the staff returned the Macoupin County application as unacceptable for filing.[2] Maggos filed a timely Petition for Reconsideration of the staff's action.

3. In his Petition for Reconsideration, Maggos requests that the Commission accept his amendment to change the transmitter location of his Macoupin County application. Maggos also asks for a waiver of one of the Commission's MMDS mutual-exclusivity rules and that his Macoupin County application be considered non-mutually exclusive with the applications proposing transmitter sites within the St. Louis MSA. Maggos states that the amendment is necessitated by the fact that Maggos lost the transmitter site specified in the Macoupin County application. Maggos argues that the new transmitter location is more than 15 miles from the border of the St. Louis MSA, and therefore the Macoupin County application is no longer mutually-exclusive with the other applications proposing transmitter sites within the St. Louis MSA. Finally, Maggos indicated that "[s]hould the Commission prefer, an acceptable alternative to the applicant would be a return of the application for St. Louis and a prompt processing and grant of the application for Macoupin County at the site" specified in his amendment.

4. *Discussion.* The issue before us is whether Maggos was allowed to file an amendment to his application prior to public notice. In a public notice of August 4, 1983, the Commission instructed potential MMDS applicants that no amendment could be filed until the MMDS application had appeared on public notice as accepted for filing. *Multichannel MDS Applications, Public Notice,* Mimeo No. 5754 (August 4, 1983). A subsequent public notice released October 24, 1983 emphasized: "No amendments to the tendered applications will be accepted until the applications are placed on public notice." *Multichannel Multipoint Distribution Service Application Lists Scheduled to be Available October 24, 1983, Public Notice,* Mimeo No. 327 (October 20, 1983).

5. Maggos tendered his change-of-location amendment approximately six months before release of the relevant public notice. *See Lottery Notice,* Report No. MMDSL-3 (September 24, 1985). It would not have been possible for the staff to make necessary mutual-exclusivity determinations, pursuant to 47 C.F.R. §§21.31 or 21.901(d)(5), if the transmitter sites of the approximately 16,500 MMDS applications filed in 1983 were repeatedly changed by amendment. The decision to use for mutual-exclusivity determinations the transmitter site specified by the MMDS applicant in the initial application, and not to allow amendments, is well within the broad discretion permitted in the ordering of the Commission's processes. *See Ranger v. FCC,* 294 F.2d 240 (D.C. Cir. 1961). Thus, the mutual-exclusivity determination, the one-to-a-market violation decision, and the dismissal of Maggos' application were proper.

6. *Conclusion and Ordering Clause.* Having carefully considered the arguments and evidence presented, we find that dismissal of Nikita Maggos' application for Macoupin County was not in error, reconsideration of this action is not warranted, and reinstatement of the application is not justified. Accordingly, IT IS ORDERED that the petition for reconsideration filed by Nikita Maggos regarding the above-referenced MMDS application IS DENIED. This or-

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[1] At the time Maggos filed his amendment, the Commission's Rule Section 21.901(d) stated in pertinent part:

> (2) The E-group channels will be assigned to a single applicant in each area and the F-group channel will be assigned to a different applicant in that area. In such areas, each applicant may submit only a single application for either the E-group channels or the F-group channels, but not both. The . . . owners . . . holding a . . . cognizable interest in the applicant for, or licensee of, one group of channels in any area, shall not have a cognizable interest in the applicant for, or licensee of, either the same group, or the other group of channels in the same area.

[2] The staff's action left the St. Louis application (File No. 7625-CM-P-83) on file for inclusion in the random selection procedure for the St. Louis MSA. The St. Louis application, however, was not chosen as the E-group tentative selectee for that market.

der is issued pursuant to 47 C.F.R. § 0.291, and is effective on its release date. *See* 47 C.F.R. §§ 1.4(b), 1.106, and 1.115.

FEDERAL COMMUNICATIONS COMMISSION

James R. Keegan
Chief, Domestic Facilities Division
Common Carrier Bureau

Before the
Federal Communications Commission
Washington, D.C. 20554

In re Authorization of

CALIFORNIA MICROWEST File No. 2501-CM-P-83

For Authority to Construct and
Operate Multichannel Multipoint
Distribution Service Station WMH681
on the E-Group Channels at
Redding, California

and Application of

VISIONAIRE, INC. File No. 15556-CM-P-83

For Authority to Construct and
Operate a Multichannel Multipoint
Distribution Service Station on
the E-Group Channels at
Redding, California

ORDER ON RECONSIDERATION

Adopted: July 30, 1993; Released: August 18, 1993

By the Chief, Domestic Facilities Division:

1. *Introduction.* VisionAire, Inc. (VisionAire) filed a petition for reconsideration of the dismissal by the Domestic Facilities Division (Division) on delegated authority of its application for authority to construct and operate a Multichannel Multipoint Distribution Service (MMDS) station on the E-group channels at Redding, California and requested reinstatement of its application. After this dismissal, a second lottery was held and the above-referenced MMDS application of California Microwest (Microwest) selected in that second lottery was subsequently granted, after qualification review. Later, VisionAire filed a second petition for reconsideration regarding its captioned application and of the grant of Microwest's captioned application.

2. *Background.* As a result of a Commission lottery, VisionAire's above-referenced application was selected for qualification review. Subsequently, Division staff initiated a qualification review of the application, pursuant to 47 C.F.R. § 21.32. Upon examination, the application was found to contain several deficiencies that precluded the staff from making a finding that VisionAire was legally, technically, financially, and otherwise qualified to be a licensee, and that a grant of its application would serve the public interest. VisionAire was notified by letter of these deficiencies and provided an opportunity to cure them within thirty (30) days of the date of the letter.[1] VisionAire was also advised in the deficiency letter that failure to file the requested information within thirty days could result in the dismissal of its application.

3. By four letters, VisionAire indicated to the Division that there was an ITFS construction permit issued for the E-group channels in the area and that further coordination would be needed, that no further demonstration of financial showing would be submitted, and that VisionAire required an additional 60 days extension of time to respond to the Division's request for an executed lease or option to lease agreement. More than twenty months after the date of the deficiency letter and more than 16 months after the date of VisionAire's last extension letter, the Division dismissed VisionAire's application because it had failed to submit requested information by a specified date. *See* 47 C.F.R. §§ 21.13(c), 21.20(d) and 21.28(d).

4. In a timely manner, VisionAire filed its petition for reconsideration and reinstatement. It included a copy of an executed option to lease agreement and an amendment proposing relocation of its transmitter to that site. In its petition, VisionAire argued that since it had now provided the option to lease agreement, its application should be reinstated. It argued that because it had been attempting to co-locate with the F-group channel licensee, HHT/Robert Hanna, and because Mr. Hanna died during the negotiation process, that the lease agreement was delayed. More than 36 months after dismissal of its application, VisionAire submitted the ITFS interference analysis required by the deficiency letter and § 21.902(i) of the rules. Almost forty months after dismissal of its application, VisionAire filed a Supplement to Petition for Reconsideration and Contingent Request for Waiver (Supplement). In that supplement, VisionAire argued that the Commission could not find its application unacceptable for filing for failure to provide a site lease option or agreement, because the evidence of site availability is a condition precedent to grant, not an acceptability criterion. VisionAire argued that an application could not be dismissed, but simply could not be granted until concrete evidence of site acceptability was filed with the Commission, citing *Revision of Part 21 of the Commission's Rules*, 2 FCC Rcd 5713, 5721 (1987) (*Revision Report and Order*). Likewise, VisionAire argued that the requirement of an ITFS interference study is a condition precedent to grant, rather than grounds for dismissal. VisionAire also argued in the Supplement that all of the requested information had now been submitted, and that to deny reinstatement would "arbitrarily exalt form over substance." (Supplement at 7). Finally, VisionAire argued that the public interest compels grant of a waiver of the rules to permit submission of requested information after dismissal of its application and reinstatement of its application.

5. *Discussion.* As of the date of the Division's dismissal letter, VisionAire still had not submitted all of the information necessary for evaluation of its qualifications to be an MMDS licensee. For example, VisionAire had not submitted a lease, lease option agreement, or other "concrete evidence" to demonstrate the availability of its proposed

[1] The deficiencies cited in the letter were absence of: 1) a fully executed lease or option to lease agreement, pursuant to §21.15(a) of the rules; 2) a Federal Aviation Administration (FAA) study of the proposed antenna structure pursuant to §§ 17.4(d) and 21.15(d); 3) current data to determine financial ability pursuant to § 21.17(b) of the rules; 4) a non-affiliation statement pursuant to §§ 21.900, 21.903(b)(1) and 21.903(b)(2); and 5) an analysis demonstrating no harmful interference to Instructional Television Fixed Service (ITFS) licensees pursuant to § 21.902(i) of the rules.

transmitter site as required by Section 21.15(a).[2] For MMDS applications subject to the Commission's lottery proceedings, a demonstration of reasonable assurance of site availability is sufficient prior to the lottery. However, once the lottery is held, a fully-executed lease, lease option agreement, or other concrete evidence of site availability must be submitted.[3] *Video/Multipoint, Inc.*, 6 FCC Rcd 5125, 5126 (Comm. Car. Bur. 1991).

6. In addition, VisionAire failed to comply with the request to submit a complete Section 21.902(i) interference analysis. At the time of dismissal, Section 21.902(i) required MMDS applicants to submit, prior to receiving construction authorization, and at such time as the Commission requested it, an analysis demonstrating that the proposed MMDS facilities would not cause harmful interference to existing cochannel or adjacent-channel ITFS stations within 50 miles of the MMDS station's proposed transmitter site, or alternatively, a consent statement from the ITFS licensee. By the express language of this rule, an MMDS applicant must submit an ITFS interference analysis at such time as the Commission requests it. Despite the specific request that this analysis be submitted by a specified date, VisionAire failed to do so. *See Fortuna Systems Corp.*, 3 FCC Rcd 5122, 5123 (Comm. Car. Bur. 1988).

7. VisionAire had a duty to submit curative amendments to its application within thirty days of the Division's written request, or to obtain an extension of time. *VisionAire, Inc.*, 5 FCC Rcd 1952 (Comm. Car. Bur. 1990). Its failure to submit curative amendments for more than twenty months substantially impeded the expeditious offering of MMDS at Redding, California. Also, VisionAire's failure to respond in a timely manner to the Division's request for information hindered the discharge of the Commission's statutorily-imposed duties under Title III of the Communications Act. *By Direction of the Commission Letter to US West*, 60 Rad. Reg. 2d (P&F) 8, 9 (1984). At the time of the dismissal, VisionAire had not provided the required ITFS interference analysis, the required lease or option agreement, the required current financial qualification data, or the required FAA study. The Division was not in a position, therefore, to complete evaluation of VisionAire's MMDS station proposal and its qualifications to be an MMDS licensee. *Multi-Point Television Distributors, Inc.*, 5 FCC Rcd 519, 520 (Com. Car. Bur. 1990).

8. *Request for Waiver.* VisionAire requests a waiver of Commission rules to allow grant of its application. VisionAire argues simply that all of the requested information has been submitted and that service to the public would be hastened by grant of its application rather than by provision by a second tentative selectee. This general argument does not meet the standards of Section 21.19 of the Rules,[4] nor the guidelines set out in *WAIT Radio v. F.C.C.*, 418 F.2d 1153, 1159 (D.C. Cir. 1969) (showing of the existence of particular hardship, equity, or more effective implementation of overall policy in the particular circumstances of this case). VisionAire is incorrect that grant of its application would further Commission policy. *See* paragraph 7, *supra*. Thus, we find that VisionAire does not provide support for its waiver argument. In particular, it does not show, or even argue, that Sections 21.13(c), 21.20(d) and 21.28(d) should not be enforced and that Division staff must wait indefinitely for an MMDS applicant to decide it now wishes qualification review of its application. Specifically with regard to the processing of MDS applications, the Common Carrier Bureau found that application processing should not be delayed awaiting applicants to cure application deficiencies. *Digital Paging Systems, supra.*

9. *Conclusion and Ordering Clause.* Having carefully considered the arguments and evidence presented, we find that dismissal of VisionAire's application for failure to comply with the Division's request for information was proper, reconsideration of that action is not warranted, and reinstatement of the application is not justified. VisionAire failed to justify waiver of our rules. Moreover, reconsideration of the grant of California Microwest's application is not warranted.[5] Accordingly, IT IS ORDERED that the petitions for reconsideration filed by VisionAire, Inc. regarding the above-referenced MMDS application and au-

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[2] Even if VisionAire was not required to comply with the requirements of Section 21.15(a), it was required, pursuant to Section 21.13(c), to submit a lease or lease option agreement after the Division directed it to do so. Section 21.13(a) provides, *inter alia:* "In addition to the general application requirements of Secs. 21.13 through 21.17 of this part, applicants shall submit any additional documents, exhibits, or signed written statements of fact: . . . (2) As the Commission, at any time after the filing of an application . . . may require from any applicant . . . to enable it to determine whether a radio authorization should be granted. . . ."

[3] Revision of Part 21 of the Commission's Rules, 2 FCC Rcd 5713, 5721 (1987) (Where there is a lottery "it shall be sufficient if the application adequately demonstrates reasonable assurance of the availability of the site. A license will not be granted, however, until concrete evidence of site availability is submitted.") The requirement to provide concrete evidence of site availability exists notwithstanding the activity or status of other adjacent channel licensees. If necessary to coordinate with other licensees, the conditional licensee can file for a minor change of transmitter location. Visionaire is incorrect that the Revision Order provides support for its argument that its application cannot be dismissed for failure to provide a site lease option or agreement. The Commission is not obliged to wait indefinitely for applicants to perfect their applications. *See* Sections 21.13(c), 21.20(d) and 21.28(d). *See also* Digital Paging Systems, 2 FCC Rcd 1523, 1524 (Comm. Car. Bur. 1987). On the other hand, applicants have an affirmative obligation to respond to Commission information requests in a timely and complete manner, or risk having their applications dismissed for failure to comply. *Id.*

[4] Section 21.19 of the Rules requires that a waiver petitioner must show that the underlying purpose of the rule would not be served, that grant of the waiver is in the public interest, that unique facts and circumstances exist which render application of the rule inequitable, unduly burdensome or otherwise contrary to the public interest, and that there is lack of a reasonable alternative.

[5] After the staff selected Microwave's application upon relottery of the Redding, California market area, and granted it without considering VisionAire's reconsideration pleadings, VisionAire filed additional petitions challenging these actions on the grounds that the Commission has no legal authority to grant Microwest's application prior to considering the reconsideration petitions. Since VisionAire's basis for its argument that Microwest's application should be dismissed was that its own application should be reinstated, and we have rejected VisionAire's request herein, we find no grounds for rescinding or reconsidering the grant of Microwest's application.

thorization ARE DENIED. This order is issued pursuant to 47 C.F.R. § 0.291, and is effective on its release date. *See* 47 C.F.R. §§ 1.4(b), 1.106, and 1.115.

FEDERAL COMMUNICATIONS COMMISSION

James R. Keegan
Chief, Domestic Facilities Division
Common Carrier Bureau

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 92-266

In the Matter of

Implementation of Sections of
the Cable Television Consumer
Protection and Competition Act
of 1992

Rate Regulation

MEMORANDUM OPINION AND ORDER AND FURTHER NOTICE OF PROPOSED RULEMAKING

Adopted: August 10, 1993; Released: August 10, 1993

Comment Date: August 31, 1993
Reply Comment Date: September 10, 1993

By the Commission: Commissioner Barrett concurring and issuing a statement; Commissioner Duggan issuing a separate statement.

I. INTRODUCTION

1. In the Memorandum Opinion and Order portion of this document, we address petitions for a stay of the Commission's cable television rate regulation rules.[1] Those rules are scheduled to take effect September 1, 1993. Petitioners ask the Commission to stay the rules until after the Commission resolves pending petitions for reconsideration and completes a parallel rulemaking concerning complementary cost-of-service standards, or, in the alternative, until judicial review is complete.[2] To the extent that petitioners request a universal stay of the rules for all cable systems, we deny the petitions. As discussed below, we conclude that petitioners have failed to meet the standards for such a broad stay. In particular, they have failed to demonstrate that the industry will suffer irreparable harm if a stay is not granted.

2. Nevertheless, we have decided that a limited, temporary stay of the rules with respect to small cable systems would serve the public interest. Therefore, we temporarily stay the effectiveness of our cable television rate regulation rules with respect to cable systems "that have 1,000 or fewer subscribers."[3] This limited stay will remain in effect until the effective date of the Commission's order on reconsideration addressing issues concerning the "administrative burdens and cost of compliance" for small cable systems.[4] Thus, we grant the petitions to the limited extent they request a stay of the cable television rate regulation rules with respect to small cable systems. We emphasize that the temporary, limited stay does not apply to cable operators that are outside the statutory definition of small cable systems, that is, those systems that have more than 1,000 subscribers. Thus, for those cable systems that do not meet the definition of "small system" contained in the Cable Act of 1992, the rate regulation rules will take effect September 1, 1993.

3. Finally, we issue a Further Notice of Proposed Rulemaking to supplement the record to facilitate our review of the application of the cable rate rules to small systems. Specifically, we seek comment on whether, in modifying our rules to reduce the administrative burdens and costs of compliance for small systems, those cable systems that are affiliated with and controlled by a multiple system operator ("MSO") should be afforded the same level of relief as small, independently owned cable systems.

II. BACKGROUND

4. The Commission's rate regulation rules implement provisions of the Cable Television Consumer Protection and Competition Act of 1992.[5] The Commission adopted the rules in a *Report and Order* released May 3, 1993, in this docket.[6] The Commission established as its primary method of regulation a system of competitive benchmarks and price caps to determine the reasonableness of rates for those cable systems subject to rate regulation. The benchmark and price cap methodology was designed to achieve the statutory goal of ensuring reasonable rates for cable service[7] while at the same time avoiding the substantial burdens of traditional, cost-based rate regulation.[8]

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[1] Petition for Stay of InterMedia Partners (filed July 28, 1993); Petition for Stay of the Coalition of Small System Operators, Prime Cable of Alaska, L.P., and the Community Antenna Television Association, Inc. (filed July 28, 1993) (hereinafter referred to as "the Coalition"); Request of Century Communications Corp. for Stay of Effective Date Pending Reconsideration or, in the Alternative, Judicial Review (filed August 2, 1993).

[2] We note that the relief petitioners seek is unaffected by the Commission's decision to move the effective date of the rules from October 1, 1993, to September 1, 1993. *See* para. 7, *infra*. Thus, we do not address issues related to that decision.

[3] Communications Act, Section 623(i), 47 U.S.C § 543(i).

[4] *Id.*

[5] Pub. L. No. 102-385, §§ 3, 9, 14, 106 Stat. 1460 (1992), *amending* Sections 623, 612 and 622(c) of the Communications Act of 1934, 47 U.S.C. §§ 543, 532 and 542(c) ("Cable Act of 1992").

[6] *Report and Order and Further Notice of Proposed Rulemaking*, MM Docket No. 92-266, FCC 93-177 (released May 3, 1993), 58 Fed. Reg. 29736 (May 21, 1993) (*"Report and Order"*).

[7] *See* Communications Act, Section 623(b)(1), 47 U.S.C. § 543(b)(1). *See also* Communications Act, Section 623(c)(1)(A), 47 U.S.C. 543(c)(1)(A) (Commission to prescribe criteria for identifying rates for cable programming services that are unreasonable).

[8] *See* Communications Act, Section 623(b)(2)(A), (B), 47 U.S.C. § 543(b)(2)(A), (B) (Commission directed to prescribe rules that seek to reduce the administrative burdens on subscribers, cable operators, franchising authorities and the Commission; Commission may adopt formulas or other mechanisms and procedures in complying with this directive).

5. In addition, the *Report and Order* specifically established an opportunity for cable operators to justify rates above benchmark levels based on the costs of providing regulated cable service. The Commission announced its commitment to adopt on an expedited basis specific standards governing optional cost-of-service showings by cable operators in a parallel rulemaking proceeding.[9] Pending the adoption of specific rules, the Commission stated that regulators will review cost-of-service showings by cable operators on a case-by case basis pursuant to general cost-of-service standards.[10]

6. The *Report and Order* established June 21, 1993, as the effective date of the new rules. Subsequently, the Commission on its own motion deferred the effective date of the rules until October 1, 1993.[11] The Commission explained that a severe budget shortfall for Fiscal Year 1993 and delay and uncertainty in securing a supplemental appropriation made it infeasible to fully implement the rules on June 21st and necessitated approximately a three-month deferral of cable rate regulation.[12]

7. Shortly thereafter, Congress passed an $11.5 million supplemental appropriation for Fiscal Year 1993 to aid the Commission in discharging its new responsibilities under the Cable Act of 1992. After the supplemental appropriation became law, the Commission on its own motion reconsidered the October 1, 1993, effective date of the rules. In an *Order* released July 27, 1993, the Commission determined that the infusion of supplemental funds would enable it to implement cable rate regulation on a slightly more expedited basis.[13] Accordingly, the Commission advanced the effective date of the rules one month to September 1, 1993.

III. DISCUSSION

A. Memorandum Opinion and Order

1. Legal Standard for Evaluating Petitions for Stay

8. The Commission evaluates petitions for stay under well-settled principles. To support a stay, petitioners must demonstrate: (1) that they are likely to prevail on the merits; (2) that they will suffer irreparable harm if a stay is not granted; (3) that other interested parties will not be harmed if the stay is granted; and (4) that the public interest favors grant of a stay.[14]

9. A concrete showing of irreparable harm is an essential factor in any request for stay.[15] The courts have required a stringent standard of proof on this issue, stressing that "the injury must be both certain and great; it must be actual and not theoretical. . . . Bare allegations of what is likely to occur are of no value since the court must decide whether the harm will *in fact* occur."[16] When, as in this case, the alleged harm has not yet occurred, the petitioners must provide proof indicating that the injury "is certain to occur in the near future."[17] Moreover, the harm must "directly result from the action which the movant seeks to enjoin."[18]

2. The Request for a Universal Stay for All Cable Systems

10. The petitions do not limit the requested relief to any particular cable system or class of systems. Rather, they request a universal stay of the rules with respect to all cable systems nationwide. Judged against the standards described above, petitioners have not met their burden for justifying such broad relief. In particular, petitioners have not demonstrated that the cable industry will be irreparably harmed if the effective date of the rules is not delayed until after the petitions for reconsideration and the pending cost-of-service rulemaking are completed or judicial review is complete.

11. Petitioners first state that many cable operators have current rates that exceed the relevant benchmark. Petitioners allege that, in some cases, reducing rates to comply with benchmark levels: (1) could result in lost revenue or increase losses currently being incurred by some cable operators; (2) could cause violations of loan covenants with respect to cash flow requirements that might result in foreclosure by lenders and bankruptcy proceedings for operators; (3) might impair the ability of operators to obtain bank financing in the future; and (4) might deprive operators of sufficient funds to implement system upgrades or improve and expand service as required by some franchise agreements, thereby raising the specter of revocation of the franchises by local franchising authorities and the potential destruction of the business. Petitioners suggest that rates that produce such potential consequences would be confiscatory.

12. These arguments are speculative and hypothetical, even assuming that the benchmark methodology – rather than the cost-of-service option – is the ratemaking approach that would be applied in all cases. The proffered evidence does not demonstrate that specific rates set pursuant to the relevant benchmark would result in confiscation. Petitioners in essence challenge the Commission's general benchmark and price cap methodology, not a specific set of rates derived under that methodology. Thus, petitioners have not made a concrete showing that the benchmark as applied in any specific franchise area will in fact prove inadequate to allow the cable operator to attract capital and earn a return commensurate with that of enterprises facing

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[9] *Report and Order*, at paras. 262-64, 270-72. The Commission subsequently issued a *Notice of Proposed Rulemaking* regarding cost-of-service standards. *Implementation of Sections of the Cable Television Consumer Protection and Competition Act of 1992, Rate Regulation*, MM Docket No. 93-215, FCC 93-353 (released July 16, 1993), 58 Fed. Reg. 40762 (July 30, 1993) (*"Cost-of-Service NPRM"*).

[10] *Report and Order*, at para. 272; *Cost-of-Service NPRM*, at n.9.

[11] *Order*, MM Docket No. 92-266, FCC 93-304 (released June 15, 1993), 58 Fed. Reg. 33560 (June 18, 1993) (*"Deferral Order"*).

[12] *Id.*, at para. 2.

[13] *Order*, MM Docket No. 92-266, FCC 93-372 (released July 27, 1993), 58 Fed Reg. 41042 (Aug. 2, 1993) (*"July 27 Order"*).

[14] *Wisconsin Gas Co. v. FERC*, 758 F.2d 669, 673-74 (D.C. Cir. 1985 (per curiam); *Washington Metropolitan Area Transit Comm'n v. Holiday Tours, Inc.* 559 F.2d 841, 842-43 (D.C. Cir. 1977); *Virginia Petroleum Jobbers Ass'n v. FPC*, 259 F.2d 921, 925 (D.C Cir. 1958).

[15] *Reynolds Metals Co. v. FERC*, 777 F.2d 760, 763 (D.C. Cir. 1985); *Wisconsin Gas*, 758 F.2d at 674.

[16] *Wisconsin Gas*, 758 F.2d at 674 (emphasis in original).

[17] *Id.*

[18] *Id.*

comparable risk, which is the standard for confiscation.[19] *See Permian Basin Area Rate Cases*, 390 U.S. 747, 773 (1968) (upholding agency denial of stay of general area-wide rate order pending disposition of petitions for special relief where court had "no reason now to believe that it would in all cases" be "an abuse of discretion," noting that "there might be many situations in which a stay would be inappropriate. . . ."). Nor have petitioners provided concrete proof that any of the alleged harms listed above are "certain to occur" in the near future.[20] For example, there is no specific proof that any franchising authority will in fact revoke a particular cable operator's franchise for a purported inability to satisfy franchise requirements regarding system upgrades and expansion of service allegedly resulting from a rate set pursuant to the benchmark. Nor is there any specific evidence that a bank will in fact foreclose on a loan of a particular cable operator if cash flows are affected by rates set at benchmark levels. Rather, petitioners offer only unsubstantiated and hypothetical allegations of harm that may occur once rate regulation begins. This showing is insufficient to justify a universal, industry-wide stay of rate regulation.

13. In any event, if rates determined pursuant to the benchmark are inadequate in specific circumstances, cable operators are free to maintain existing rates above the "benchmark, or to raise future rates above the benchmark, on the basis of a cost-of-service showing tied to their own specific costs pending evaluation of that showing by regulators.[21] Such a cost-of-service showing could be used to avoid the alleged harms about which petitioners speculate.[22]

14. Petitioners' claim that they are unable to avail themselves of the cost-of-service option because the Commission has not yet adopted specific rules to govern cost-of-service showings is without merit. This position assumes that the Commission will not take actions consistent with minimum statutory and constitutional standards that necessarily would govern the Commission's (and local franchising authorities') evaluation of any cost-of-service showing. Although comprehensive cost-of-service rules have not yet been adopted, the statutory standard of "reasonable" rates, which ultimately would govern such rules, is sufficiently concrete to protect the interests of both cable operators and subscribers in the interim.[23] Under established ratemaking principles, the lowest reasonable rate is one that is not confiscatory in the constitutional sense.[24] A just and reasonable, nonconfiscatory rate should be "sufficient to assure confidence in the financial integrity of the enterprise so as to maintain its credit and to attract capital."[25] The rate should also be "commensurate with returns on investments in other enterprises having corresponding risks."[26]

15. The Commission's regulatory scheme recognizes these constitutional and statutory commands. To the extent that the Commission's primary method of competitive benchmarks and price caps may be inadequate when applied in individual circumstances, the Commission has given assurance that it will permit cable operators an opportunity to demonstrate the reasonableness of higher rates based on costs and to charge existing higher rates based on these costs until a ruling is made on its cost demonstration. An abundance of case law exists on such fundamental ratemaking issues as which costs properly may be included in the regulated rate base and what constitutes a fair rate of return on investment for regulated entities. The Commission's *Cost-of-Service NPRM*, as well as its rules and decisions regarding ratemaking issues in the telephone context, offer guidance as well. Thus, as we stated in the *Report and Order* and the *Cost-of-Service NPRM*, pending adoption of specific cable cost-of-service rules, cable operators who believe that rates set pursuant to benchmark levels are inadequate as applied in a specific franchise area may seek approval for higher rates from regulators on a case-by-case basis pursuant to general cost-of-service principles. The Commission and local franchising authorities will consider such requests pursuant to governing statutory and constitutional standards.

16. We note that the Commission is moving as expeditiously as possible to address reconsideration petitions and to adopt specific rules to govern cost-of-service showings by cable operators. That the Commission's cost-of-service rulemaking is not yet complete does not in any way diminish a cable operator's opportunity to continue to charge existing above-benchmark rates and to make a cost-of-service showing for those or other above-benchmark rates in the future pending a ruling by regulators. Nor does the pending cost-of-service rulemaking require that rate regulation be delayed until specific rules are adopted. While it would be preferable to have specific rules in place, sufficient standards exist to guide cable operators seeking to make cost-of-service showings during this transitional period.[27] The suggestion by petitioners that the interim standards will be applied inappropriately or in a way that destroys cable operators' opportunity to operate profitably is purely speculative and does not meet the standard for irreparable injury. Of course, if in a specific case a franchising authority (or the Commission) applied general cost-of-service standards in a confiscatory manner, the cable operator could seek an administrative or judicial stay at that time, where a specific factual context would be present.[28]

17. To the extent that the requests for stay are simply a broad attack on rate regulation in general, we note that rate regulation, in and of itself, does not constitute irreparable harm. In crafting our rate regulation rules, we

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[19] *See FPC v. Hope Natural Gas Co.*, 320 U.S. 591, 603 (1944); *Jersey Central Power & Light Co. v. FERC*, 810 F.2d 1168, 1175 (D.C. Cir. 1987) (en banc).

[20] *Wisconsin Gas*, 758 F.2d at 674.

[21] *Report and Order*, at para. 272.

[22] *See* para. 11, *supra*.

[23] *Cf. AT&T v. U.S.*, 299 U.S. 232, 246 (1936) (just and reasonable standard not unreasonably vague).

[24] *FPC v. Natural Gas Pipeline Co.*, 315 U.S. 575, 585 (1942).

[25] *Hope*, 320 U.S. at 603. This is often referred to as the "capital attraction" standard.

[26] *Id.* This is often referred to as the "comparable risk" standard.

[27] *See Permian Basin Area Rate Cases*, 390 U.S. at 771-72 ("It would doubtless be desirable if the Commission provided, as quickly as may be prudent, a more precise summary of its conditions for special relief [of its general area rate order], but it was not obliged to delay area regulation until such guidelines could be properly drawn.").

[28] *See Report and Order*, at n.640 (cable operator may request Commission to stay a decision by a local franchising authority to reduce rates based on cost-of-service determinations).

have attempted to balance the interests of subscribers in paying reasonable rates for regulated cable service with the legitimate interests of cable operators in recovering their costs and earning a reasonable profit.[29] However, cable operators are not constitutionally or statutorily entitled to maintain rates established prior to regulation that are based on financial practices, arrangements and expectations existing in an unregulated environment. Neither is there any constitutional or statutory requirement that the Commission's regulatory scheme must enable cable operators to select the option that maximizes their financial position. We conclude that the petitions do not make a sufficient showing that the cable industry will suffer irreparable harm if the rules are not stayed.[30]

18. Finally, we believe it is indisputable that a delay of rate regulation for all cable systems and all subscribers, such as that sought by petitioners, would undercut the congressional mandate that cable rates be regulated and the underlying congressional determination that such rate regulation is in the public interest. In this regard, we note that while Congress did not establish a specific effective date for the cable rate regulation rules, the statutory requirement that the Commission prescribe its rate regulation rules "[w]ithin 180 days after the date of enactment" of the Cable Act of 1992[31] suggests a strong congressional policy in support of expedited implementation. This policy is further supported by language in the Conference Report accompanying the legislation enacting the Commission's supplemental budget appropriation.[32] We thus conclude that a universal stay of our rate regulation rules with respect to all cable systems is not warranted.

3. Temporary, Limited Stay for Small Cable Systems

19. The Cable Act of 1992 recognizes that rate regulation may present special burdens for small cable systems. Thus, Section 623(i) of the Act provides: "In developing and prescribing regulations pursuant to this section, the Commission shall design such regulations to reduce the administrative burdens and cost of compliance for cable systems that have 1,000 or fewer subscribers."[33] In our *Report and Order*, we attempted to craft our rules with these considerations in mind.[34] Nevertheless, we have received numerous petitions for reconsideration of the *Report and Order* indicating that our cable rate regulation rules present particularly substantial administrative burdens and compliance costs for small systems that will result in a disproportionate overall burden on these systems.

20. Particularly in light of the clear congressional concern that small cable systems[35] not be subjected to inordinate administrative burdens and costs of compliance, we believe that, on balance, the public interest would be served best by staying our rate regulation rules on a temporary basis with respect to such cable systems.[36] This temporary stay will give us an opportunity to evaluate fully the arguments and proposals currently before the Commission on ways to reduce the administrative burdens and compliance costs that may disproportionately affect small cable systems. Moreover, because systems with under 1,000 subscribers serve only approximately 3.6 percent of cable subscribers nationwide,[37] the stay will have only a marginal effect on our overall schedule for cable rate regulation. Accordingly, to the extent that the petitions request this limited relief, we grant the petitions.[38] The stay shall remain in effect until the effective date of the Commission's order on reconsideration addressing the small cable system issue. We intend to resolve this specific issue in the near future.

21. We emphasize that the temporary, limited stay does not apply to cable systems that have more than 1,000 subscribers. The reasons discussed above for granting the limited stay with respect to small cable systems do not apply with equal force to larger cable systems. Congress explicitly singled out small cable systems for special consideration. The record on reconsideration raises serious questions about whether the Commission's rate regulation rules, as currently drafted, may create burdens and costs that are unique to small systems. Thus, we do not stay the effect of the rate regulation rules for those cable systems that are not "small systems" as defined in Section 623(i) of the statute. For systems that have more than 1,000 subscribers, the rate regulation rules will take effect September 1, 1993.

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[29] We note that our findings in the context of this action do not foreclose our ability to make future adjustments to the rate regulation mechanisms during reconsideration, in the event we deem it prudent and necessary.

[30] Century's further speculation that application of the Commission's rules threatens to damage its business reputation and customer goodwill falls far short of the concrete showing of irreparable harm necessary to support a stay. Moreover, its argument that the absence of specific cost-of-service rules leaves the Commission and franchising authorities unrestrained discretion in ruling on cost-of-service showings, in violation of due process and the First Amendment, is meritless. The availability of the cost-of-service option -- governed by the constitutional confiscation standard -- refutes any suggestion that petitioner's due process rights are somehow threatened. Similarly, rate regulation (particularly as limited by the constitutional confiscation standard) alone has never been viewed as raising First Amendment issues. In fact, the cable television industry (or segments of that industry) virtually from its inception has been subject to some form of rate regulation. Rate regulation under the Cable Act of 1992 pursuant to content-neutral economic standards does not implicate First Amendment concerns.

[31] Communications Act, Sections 623(b)(2), (c)(1), 47 U.S.C. §§ 543(b)(2), (c)(1).

[32] *See* 139 Cong. Rec. H4377 (June 30, 1993).

[33] Communications Act, Section 623(i), 47 U.S.C. § 543(i). Such systems constitute 59 percent of all systems but only 3.6 percent of all cable subscribers. *See* 1993 TV and Cable Factbook Services Volume 61, p. I-69.

[34] *Report and Order*, at paras. 462-65.

[35] For rate regulation purposes, we determine system size by a system's principal headend, including any other headends or microwave receive sites that are technically integrated to the system's principal headend, rather than on a franchise area basis. *Report and Order*, at para. 465.

[36] The limited, temporary stay applies to all cable systems that have 1,000 or fewer subscribers, regardless of ownership or affiliation. However, in evaluating how to modify our rules on reconsideration to reduce burdens on small cable systems, we are also seeking comment on whether our rules should distinguish between small, independently owned systems and those affiliated or controlled by an MSO for purposes of implementing Section 623(i). *See* Further Notice of Proposed Rulemaking, *infra*.

[37] 1993 TV and Cable Factbook Services Volume 61, p. I-69.

[38] The Coalition's petition, in particular, focuses on the disproportionate impact of the rate regulation rules on small cable systems.

B. Further Notice of Proposed Rulemaking

22. In the *Report and Order*, we stated that we would apply our small system rules to systems with under 1,000 subscribers, regardless of whether the system is independent or owned by an MSO.[39] In so doing, we declined invitations by certain commenters to draw a distinction between small independently owned cable systems and those small systems that are affiliated with or controlled by large MSOs.[40] We noted that the language of the Cable Act does not distinguish between such systems, and that the problems faced by small systems serving smaller, often more rural communities occur whether or not the system is owned by an MSO. We thus declined to presume that large corporate ownership of a small system automatically would make compliance with our rate regulation rules and procedures less costly.[41]

23. Upon further reflection, we have decided to explore further whether any relief that we ultimately may provide to small cable systems should extend to all small systems or only to such systems that are not affiliated with or controlled by large MSOs.[42] In particular, we seek comment on whether we should establish a "subscriber cap" that, with respect to MSO-owned small systems, would limit relief to those systems that are controlled by an MSO having less than a certain number of subscribers in the aggregate. This cap could be set, for example, at one million total subscribers for the MSO, or at some lower or higher figure. We seek comment on the need for such a cap generally, and, if such a cap is warranted, the specific number of aggregate subscribers that would serve as the demarcation point for small system relief for MSO-owned systems.

24. Our previous survey of industry data indicates that, for those small systems responding to the survey, approximately 83 percent are affiliated with an MSO.[43] Thus, for those small systems responding, approximately 17 percent represented independently owned systems. We are interested in gaining more information on the number of independently owned cable systems with fewer than 1,000 subscribers, the number that are affiliated with MSOs, and the size of the parent MSOs. Commenting parties are encouraged to provide detailed information on these issues.

25. We also solicit comment on the generic differences between independent small systems and those small systems affiliated with or owned by MSOs. Specifically, we seek comment on whether our rate regulation rules create disproportionate problems for small, independent systems that are not faced to the same degree by MSO-owned small systems. We particularly are interested in comments addressed to the issue of whether small systems owned by MSOs enjoy economies of scale and scope not available to independent small systems. In this regard, we seek comment on the types of cost advantages available to MSO-owned systems, including, for example, volume discounts for programming, favorable rates on debt acquisition, and discounts on equipment, maintenance and supplies. If such economies of scale and scope exist, at what point (*i.e.*, aggregate number of subscribers) do such economies warrant adoption of a subscriber cap for purposes of determining regulatory relief for small systems owned by MSOs? We also seek comment on any incentives that such a cap might create, and conversely, whether the absence of such a subscriber cap could create incentives for the disaggregation of systems to place some systems within the cap. If disaggregation occurs, we also solicit comment on whether the Commission should consider such restructuring an evasion under Section 623(h).

26. *Ex Parte Rules -- Non-Restricted Proceeding.* This is a non-restricted notice and comment rulemaking proceeding. *Ex parte* presentations are permitted, except during the Sunshine Agenda period, provided they are disclosed as provided in Commission rules. *See generally*, 47 C.F.R. §§ 1.1202, 1.1203, and 1.1206(a).

27. *Initial Regulatory Flexibility Analysis.* As required by Section 603 of the Regulatory Flexibility Act, the Commission has prepared an Initial Regulatory Flexibility Analysis (IRFA) of the expected impact on small entities of the proposals suggested in this document. Written public comments are requested on the IRFA. These comments must be filed in accordance with the same filing deadlines as comments on the rest of the Further Notice, but they must have a separate and distinct heading designating them as responses to the Initial Regulatory Flexibility Analysis. The Secretary shall send a copy of this Further Notice of Proposed Rulemaking, including the Initial Regulatory Flexibility Analysis, to the Chief Counsel for Advocacy of the Small Business Administration in accordance with paragraph 603(a) of the Regulatory Flexibility Act, Pub. L. No. 96-354, 94 Stat. 1164, 5 U.S.C. § 601 *et seq.* (1980).

28. Reason for action: This Further Notice of Proposed Rulemaking is issued to obtain comment on whether the Commission should distinguish between small independent cable television systems and those small systems affiliated with or owned by an MSO, for purposes of modifying the Commission's cable television rate regulation rules to reduce administrative burdens and cost of compliance for small cable systems.

29. Objectives: To modify existing rules to implement Section 623(i) of the Communications Act of 1934, as amended by the Cable Television Consumer Protection and Competition Act of 1992.

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[39] *Report and Order*, at para. 464.

[40] *See, e.g.*, NATOA Comments at 88 (small systems controlled by large MSOs have a variety of cost advantages, particularly access to programming discounts, and the ability to acquire debt at the favorable rates a large corporation can obtain); USTA Comments at 16-17 (larger MSOs are likely to have greater leverage with respect to local government and to have corporate resources that stand-alone small systems or those operated by smaller MSOs do not have); Northland Comments at 17-18 (large MSOs are likely to enjoy substantial programming volume discounts, discounts on maintenance and supplies, and are likely to be able to purchase debt at a more favorable rate than smaller MSOs).

[41] *Report and Order*, at para. 464.

[42] We note that our review of the distinct attributes of small, independently owned cable systems, as compared to those small systems affiliated with large MSOs, will be guided in part by our reconsideration of the rate regulation mechanism, and how it may apply uniquely to small systems. *See, e.g.*, petitions for reconsideration filed by Coalition of Small System Operators, Community Antenna Television Association, Inc.

[43] For purposes of the survey, an MSO was defined as a company with two or more systems.

30. Legal Basis: The proposed action is authorized under Sections 4(i), 4(j), 303(r) and 623 of the Communications Act of 1934, as amended, 47 U.S.C. §§ 154(i), 154(j), 303(r) and 543.

31. Reporting, record keeping and other compliance requirements: The proposal under consideration in this Further Notice of Proposed Rulemaking may modify reporting and record keeping requirements for cable systems subject to the Commission's rate regulation rules with 1,000 or fewer subscribers.

32. Federal rules which overlap, duplicate or conflict with these rules: None.

33. Description, potential impact, and number of small entities involved: Any rules changes in this proceeding could affect cable systems with 1,000 or fewer subscribers, specifically such systems that are affiliated with or owned by an MSO. After evaluating the comments in this proceeding, the Commission will further examine the impact of any rule changes on small entities and set forth our findings in the Final Regulatory Flexibility Analysis.

34. Any significant alternatives minimizing the impact on small entities consistent with stated objectives: The Further Notice of Proposed Rulemaking seeks comment on how to reduce administrative burdens and cost of compliance for cable systems subject to the Commission's rate regulation rules that have 1,000 or fewer subscribers.

35. *Paperwork Reduction Act.* The proposal contained herein has been analyzed with respect to the Paperwork Reduction Act of 1980 and found to impose a new or modified information collection requirement on the public. Implementation of any new or modified requirement will be subject to approval by the Office of Management and Budget as prescribed by the Act.

36. *Comment Dates.* Pursuant to applicable procedures set forth in Sections 1.415 and 1.419 of the Commission's rules, 47 C.F.R. §§ 1.415 and 1.419, interested parties may file comments on or before **August 31, 1993,** and reply comments on or before **September 10, 1993**. To file formally in this proceeding, you must file an original and four copies of all comments, reply comments, and supporting comments. If you want each Commissioner to receive a personal copy of your comments, you must file an original plus nine copies. You should send comments and reply comments to Office of the Secretary, Federal Communications Commission, Washington, D.C. 20554. Comments and reply comments will be available for public inspection during regular business hours in the FCC Reference Center, Room 239, Federal Communications Commission, 1919 M Street, N.W., Washington, D.C. 20554.

IV. CONCLUSION

37. We conclude that petitioners have not demonstrated that a universal stay of our cable television rate regulation rules for all cable systems until completion of pending reconsideration petitions and the cost-of-service rulemaking or judicial review is warranted. We grant a temporary, limited stay of the rules with respect to those cable systems that have 1,000 or fewer subscribers until the Commission reconsiders the administrative burdens and costs of compliance with rate regulation on such small cable systems. For all other cable systems, our rate regulation rules will take effect on September 1, 1993. Finally, we seek further comment on the small system issue to assist our review on reconsideration.

V. ORDERING CLAUSES

38. Accordingly, IT IS ORDERED, that the petitions for stay filed by InterMedia Partners, and the Coalition of Small System Operators, Prime Cable of Alaska, L.P., and the Community Antenna Television Association, Inc., on July 28, 1993, and Century Communications Corp. on August 2, 1993, ARE GRANTED to the limited extent they seek a stay of the cable television rate regulation rules with respect to cable systems that have 1,000 or fewer subscribers, and otherwise ARE DENIED.

39. IT IS FURTHER ORDERED, that the Commission's cable television rate regulation rules adopted in *Report and Order and Further Notice of Proposed Rulemaking,* MM Docket No. 92-266, FCC 93-177 (released May 3, 1993), 58 Fed. Reg. 29736 (May 21, 1993) ARE TEMPORARILY STAYED with respect to those cable systems with 1,000 or fewer subscribers. This limited stay shall remain in effect until the effective date of the Commission's order on reconsideration addressing issues concerning administrative burdens and costs of compliance for small cable systems.

40. IT IS FURTHER ORDERED that, pursuant to Sections 4(i), 4(j), 303(r), and 623 of the Communications Act of 1934, 47 U.S.C. §§ 154(i), 154(j), 303(r), and 543, NOTICE IS HEREBY GIVEN of proposed amendments to Part 76, in accordance with the proposals, discussions, and statement of issues in this Further Notice of Proposed Rulemaking, and that COMMENT IS SOUGHT regarding such proposals, discussion, and statement of issues.

41. IT IS FURTHER ORDERED that the Secretary shall send a copy of this Further Notice of Proposed Rulemaking to the Chief Counsel for Advocacy of the Small Business Administration in accordance with paragraph 603(a) of the Regulatory Flexibility Act, Pub. L. No. 96-354, 94 Stat. 1164, 5 U.S.C. §§ 601 *et seq.* (1981).

FEDERAL COMMUNICATIONS COMMISSION

William F. Caton
Acting Secretary

CONCURRING STATEMENT

OF

COMMISSIONER ANDREW C. BARRETT

RE: Implementation of the Cable Television Consumer Protection and Competition Act of 1992 -- Rate Regulation (Stay of Rules)

This Memorandum Opinion and Order and Further Notice of Proposed Rulemaking: (1) denies petitions for a universal stay of the cable rate regulation rules; (2) grants a temporary, limited stay of the rules with respect to small cable systems -- defined as those systems with 1000 or fewer subscribers -- until the Commission issues an order on reconsideration to address issues concerning the "administrative burdens and costs of compliance for small cable systems; and (3) seeks additional comment from the public to facilitate our review of how the cable regulations apply to small cable systems.

I concur with this decision. I believe that the temporary stay should focus on small cable systems that truly manifest the attributes and problems associated with small systems.[1] Indeed, this decision is intended to provide limited relief to the extent that small cable systems disproportionately experience administrative burdens and costs of compliance. However, I believe that the record does not clearly indicate that all cable systems with fewer than 1000 subscribers require such relief. Thus, I question whether the definition of "small systems" should apply only to small operators affiliated with multiple system operators (MSOs) where they either represent a significant percentage of the MSO operations, or are independently-owned. Without further evidence, it is not clear to me that small operators affiliated with larger MSOs (i.e., top 30 MSOs with 400,000 subscribers or more) are unable to receive assistance from their corporate parent. Accordingly, I believe that the "small system" definition should impose a subscriber cap on MSOs in order to direct the relief toward those small systems that truly lack the resources to comply with cable rate regulations at this time.

I particularly am concerned that in the absence of an "MSO cap", this decision will affect nearly 5900 of the over 11,000 cable

[1] Section 623(i) of the 1992 Cable Act directs the Commission to design rate regulations to reduce the administrative burdens and cost of compliance for cable systems that have 1000 or fewer subscribers.

systems nationwide, or approximately 59% of all cable systems.[2] I recognize, however, that the Commission's capacity to decide this issue is limited by its own resources and available information. Given the large number of systems affected by this temporary stay, the Commission must be informed as to the number of affected "small systems" that are affiliated with certain MSOs, and the extent to which the affiliated small systems actually experience similar constraints as those without access to the resources of larger MSOs. As a result, I encourage parties to respond to the questions raised in the Further Notice on this issue, and I support the decision to deny petitions for a universal stay of the cable rate regulations.

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[2] See 1993 Television and Cable Factbook, Services Volume 61, p. I-69.

Separate Statement of Commissioner Ervin S. Duggan

In the Matter of Implementation of Sections of the Cable Television Consumer Protection and Competition Act of 1992: Rate Regulation

I support both of the actions that the Commission takes today: denying an across-the-board stay of rate regulation, and granting a temporary, limited stay for systems of 1,000 subscribers or less. I write separately to ensure that no one mistakes the Commission's temporary stay for small systems as a lack of commitment to the task of rate regulation.

The act of bringing temporary relief to small cable systems affects only 3.6 percent of all cable subscribers. More than 96 percent of subscribers will see rate regulation begin on September 1 as scheduled. The overall impact of this decision, therefore, is slight.

Congress, however, specifically gave the Commission these instructions in the 1992 Cable Act: "In developing and prescribing regulations. . . the Commission shall design such regulations to reduce the administrative burdens and cost of compliance for cable systems that have 1,000 or fewer subscribers."* We provided only minimal relief for small systems in the April 1 Report and Order that launched our rate rules. Since that time, we have received considerable anecdotal evidence--- both on the record, and in trade press accounts--- suggesting that small companies have had a particularly difficult time as they began their efforts to comply with our regulations. Among the hardest-hit appear to be small systems unaffiliated with large, integrated companies (whose resources are presumably adequate to deal with the new rate requirements).

I favor a streamlined, simplified approach to regulation for small systems, as Congress has directed. Moreover, it seems apparent to me

* 47 U.S.C. Section 543(i).

that any permanent streamlining we consider should probably be narrowly tailored to benefit independent operators most--- particularly the small, rural, mom-and-pop systems for whom the new regulations must seem to be an incomprehensible tangle.

Because my views about permanent relief for small systems are preliminary, I support a request for further comment on the issue. We may well conclude that an "MSO cap" limiting small system relief to the most directly affected operators has merit. I look forward to reviewing the supplemental record we are gathering on this aspect of our rules.

# # #

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 93-233

In the Matter of

Amendment of Section 76.51
of the Commission's Rules
to Include Pine Bluff,
Arkansas, in the Little Rock,
Arkansas, Television Market

NOTICE OF PROPOSED RULE MAKING

Adopted: August 9, 1993; Released: August 19, 1993

Comment Date: September 23, 1993
Reply Comment Date: October 8, 1993

By the Chief, Mass Media Bureau:

1. Before the Commission is a petition for rule making filed May 6, 1993, by Agape Church, Inc. ("Agape" or "Petitioner"), licensee of television station KVTN, Channel 25 (Independent), Pine Bluff, Arkansas, to amend Section 76.51 of the Commission's Rules, 47 C.F.R. §76.51, to change the designation of the Little Rock, Arkansas television market to "Little Rock-Pine Bluff, Arkansas." *See Report and Order* in MM Docket No. 92-259 (Broadcast Signal Carriage Issues), 8 FCC Rcd 2965, 2977-78, n.150 (1993).[1]

BACKGROUND

2. Section 76.51 of the Commission's Rules enumerates the top 100 television markets and the designated communities within those markets. Among other things, this market list is used to determine territorial exclusivity rights under Section 73.658(m) and helps define the scope of compulsory copyright license liability for cable operators. *See* 47 C.F.R. §76.658(m) and 17 U.S.C. §111(f). Some of the markets consist of more than one named community (a "hyphenated market"). Such "hyphenation" of a market is based on the premise that stations licensed to any of the named communities in the hyphenated market do, in fact, compete with all stations licensed to such communities. *See CATV-Non Network Agreements*, 46 FCC 2d 892, 898 (1974). Market hyphenation "helps equalize competition" where portions of the market are located beyond the Grade B contours of some stations in the area yet the stations compete for economic support. *See Cable Television Report & Order*, 36 FCC 2d 143, 176 (1972).

3. In evaluating past requests for hyphenation of a market, the Commission has considered the following factors as relevant to its examination: (1) the distance between the existing designated communities and the community proposed to be added to the designation; (2) whether cable carriage, if afforded to the subject station, would extend to areas beyond its Grade B signal coverage area; (3) the presence of a clear showing of a particularized need by the station requesting the change of market designation; and (4) an indication of benefit to the public from the proposed change. Each of these factors helps the Commission to evaluate individual market conditions consistent "with the underlying competitive purpose of the market hyphenation rule to delineate areas where stations can and do, both actually and logically, compete."[2]

4. Section 4 of the Cable Television Consumer Protection and Competition Act of 1992 ("Cable Act"),[3] which amended Section 614 of the Communications Act of 1934, as amended ("Act"), 47 U.S.C. §614, requires the Commission to make revisions needed to update the list of top 100 television markets and their designated communities in Section 76.51 of the Commission's Rules. *See* Section 614(f) of the Act.[4] The Commission stated that where sufficient evidence has been presented tending to demonstrate commonality between the proposed community to be added to a market designation and the market as a whole, such cases will be considered under an expedited rule making procedure consisting of the issuance of a Notice of Proposed Rule Making based on the submitted petition.

THE PETITION

5. In support of its request, Agape states that the subject market consists of two major population centers, Little Rock and Pine Bluff, with the community of Pine Bluff approximately 30 air miles southeast of Little Rock. It notes that there are five stations licensed to Little Rock -- KETS, Channel 2; KARK, Channel 4; KATV, Channel 7; KTHV, Channel 11; and KLRT, Channel 16 -- and two stations licensed to Pine Bluff -- KVTN, Channel 25, and KASN, Channel 38. The Petitioner states that both KVTN and KASN place a Grade B signal over Little Rock, and that both Pine Bluff television stations "substantially over-

[1] The Commission has delegated to the Chief, Mass Media Bureau, authority to act on petitions for rule making seeking market redesignation and has stated that it expects "that requests for specific hyphenated market changes that appear worthy of consideration will be routinely docketed and issued as rulemaking proposals." *See Report and Order* in MM Docket No. 92-259, *supra*, at 2977-78, n.150 (1993).

[2] *See, e.g., TV 14, Inc. (Rome, Ga.)*, 7 FCC Rcd 8591, 8592 (1992), *citing Major Television Markets (Fresno-Visalia, California)*, 57 RR 2d 1122, 1124 (1985). *See, also, Press Broadcasting Company, Inc.*, 8 FCC Rcd 94, 95 (1993).

[3] Cable Television Consumer Protection and Competition Act, Pub. L. No. 102-385, 106 Stat. 1460 (1992).

[4] In connection with the implementation of the broadcast signal carriage ("must-carry") provisions of the Cable Act, the Commission concluded that a major update of Section 76.51 was not necessary based on the record then before it. Nevertheless, the Commission did make some minor revisions to Section 76.51 of the Rules, and announced that it would consider further revisions to the list of television markets on a case-by-case basis, delegating authority to act on such petitions to the Chief, Mass Media Bureau. *See Report and Order* in MM Docket No. 92-259, *supra*.

lap the coverage areas of the five television stations which are licensed to Little Rock."[5] Agape further asserts that Pine Bluff is included by Arbitron in the Little Rock Area of Dominant Influence (ADI), the Little Rock Survey Area and the Little Rock Metro Rating Area. From these facts, Agape states that all the stations licensed to communities in the market compete for audience and economic support throughout the Little Rock market.

6. The gravamen of Agape's petition is that although the Pine Bluff and Little Rock stations are unavoidably competitive throughout the market area, amendment of the Commission's Rules as proposed is essential to reflect market realities and to equalize competition among the stations. Specifically, it states that while KVTN is entitled to carriage on Little Rock ADI cable systems under the Commission's new must-carry rules,[6] because Pine Bluff is not a designated community in the Section 76.51 market listings, the station would be considered a "distant signal" for purposes of compulsory copyright license liability if carried on certain cable systems in the ADI.[7] As a result, Agape states that it has already received notifications by several Little Rock-area cable systems that they will not carry the station due to the increased copyright liability attendant to the carriage of a "distant signal."[8]

7. Inasmuch as market hyphenations are "based on the premise that stations licensed to any of the named communities [within a designated market] do, in fact, compete with all stations licensed to such communities," the Petitioner states that it meets all the criteria for the requested amendment of Section 76.51. In addition to the competitive nature of the market, Agape states that the proposed hyphenation of the market will not extend the cable carriage of KVTN substantially beyond the station's Grade B contour. It alleges that "the principal Little Rock-area cable systems that would be affected by the rule change are within KVTN's Grade B contour . . ., [with] the only significant exception [being] a cable system . . . just slightly beyond Station KVTN's Grade B contour." Moreover, in addition to its particularized need to equalize competition in the market, Agape asserts that the public will benefit from its proposal because Little Rock-area cable systems will be able to carry the station's diversified, independent programming.

DISCUSSION

8. Based on the facts presented, we believe that a sufficient case for redesignation of the subject market has been set forth so that this proposal should be tested through the rule making process, including the comments of interested parties. It appears from the information before us that Station KVTN and stations licensed to communities in the Pine Bluff and Little Rock television markets do compete for audiences and advertisers throughout much of the proposed combined market area, and that sufficient evidence has been presented tending to demonstrate commonality between the proposed community to be added to a market designation and the market as a whole. Moreover, Petitioner's proposal appears to be consistent with the Commission's policies regarding redesignation of a hyphenated television market.

ADMINISTRATIVE MATTERS

Ex Parte Rules -- Non-Restricted Proceeding

9. This is a non-restricted notice and comment rule making proceeding. *Ex parte* presentations are permitted, provided they are disclosed as provided in the Commission's Rules. *See generally* 47 C.F.R. §§ 1.1202, 1.1203 and 1.1206(a).

Comment Information

10. Pursuant to applicable procedures set forth in §§ 1.415 and 1.419 of the Commission's Rules, interested parties may file comments on or before **September 23, 1993,** and reply comments on or before **October 8, 1993**. All relevant and timely comments will be considered before final action is taken in this proceeding. To file formally in this proceeding, participants must file an original and four copies of all comments, reply comments, and supporting comments. If participants want each Commissioner to receive a personal copy of their comments, an original plus nine copies must be filed. Comments and reply comments should be sent to the Office of the Secretary, Federal Communications Commission, Washington, D.C. 20554. Comments and reply comments will be available for public inspection during regular business hours in the FCC Reference Center (Room 239) of the Federal Communications Commission, 1919 M Street, N.W., Washington, D.C. 20554.

Initial Regulatory Flexibility Analysis

11. We certify that the Regulatory Flexibility Act of 1980 does not apply to this rule making proceeding because if the proposed rule amendment is promulgated, there will not be a significant economic impact on a substantial number of small business entities, as defined by Section 601 (3) of the Regulatory Flexibility Act. A few television licensees will be affected by the proposed rule amendment. The Secretary shall send a copy of this *Notice of Proposed Rule Making,* including the certification, to the Chief Counsel for Advocacy of the Small Business Administra-

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[5] The Petitioner states that the coverage of the Little Rock area by the Pine Bluff stations results, in part, because their transmitters are located approximately half way between the two cities and in close proximity to Little Rock station KATV.

[6] *See* Section 76.56(b) of the Commission's Rules.

[7] Stations licensed to communities specifically designated in Section 76.51 are considered local for all cable systems within the 35-mile zones of all listed communities in a given hyphenated market. The absence of Pine Bluff as a designated community in this market list results in KVTN's classification as a "distant signal" for market-area cable systems more than 35 miles from Pine Bluff.

[8] Section 76.58(d) of the Commission's Rules required a cable operator to notify all local television stations by May 3, 1993, that they may not be entitled to mandatory carriage on the system because such carriage may cause an increased copyright liability to the cable system. Under the provisions of Section 76.55(c)(2) of the Rules, a local commercial television station otherwise entitled to mandatory carriage need not be carried on market-area cable systems if the station is considered a "distant signal" under the copyright compulsory license (17 U.S.C. §111) and the station does not agree to indemnify the cable operator for the increased copyright liability. *See Report and Order* in MM Docket No. 92-259, *supra,* at 2973-74.

tion in accordance with paragraph 603(a) of the Regulatory Flexibility Act. Pub. L. No. 96-354, 94 Stat. 1164, 5 U.S.C. Section 601 *et seq.* (1981).

Additional Information

12. For additional information on this proceeding, contact James A. Hudgens, Office of Plans and Policy, (202) 653-5940.

FEDERAL COMMUNICATIONS COMMISSION

Roy J. Stewart
Chief, Mass Media Bureau

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 93-232

In the Matter of

Amendment of Section 76.51
of the Commission's Rules
to Include Concord,
California, in the
San Francisco-Oakland-San Jose,
California, Television Market

NOTICE OF PROPOSED RULE MAKING

Adopted: August 11, 1993; Released: August 19, 1993

Comment Date: September 22, 1993
Reply Comment Date: October 7, 1993

By the Chief, Mass Media Bureau:

1. Before the Commission is a petition for rule making filed June 29, 1993, by First Century Broadcasting, Inc. ("First Century"), licensee of television station KFCB-TV, Channel 42 (Independent), Concord, California. First Century seeks to amend Section 76.51 of the Commission's Rules, 47 C.F.R. §76.51, to change the designation of the San Francisco-Oakland-San Jose, California, television market to include the community of Concord, California.[1]

BACKGROUND

2. Section 76.51 of the Commission's Rules enumerates the top 100 television markets and the designated communities within those markets. Among other things, this market list is used to determine territorial exclusivity rights under Section 73.658(m) and helps define the scope of compulsory copyright license liability for cable operators. *See* 47 CFR §76.658(m) and 17 U.S.C. §111(f). Some of the markets consist of more than one named community (a "hyphenated market"). Such "hyphenation" of a market is based on the premise that stations licensed to any of the named communities in the hyphenated market do, in fact, compete with all stations licensed to such communities. *See CATV-Non Network Agreements*, 46 FCC 2d 892, 898 (1974). Market hyphenation "helps equalize competition" where portions of the market are located beyond the Grade B contours of some stations in the area yet the stations compete for economic support. *See Cable Television Report & Order*, 36 FCC 2d 143, 176 (1972).

3. In evaluating past requests for hyphenation of a market, the Commission has considered the following factors as relevant to its examination: (1) the distance between the existing designated communities and the community proposed to be added to the designation; (2) whether cable carriage, if afforded to the subject station, would extend to areas beyond its Grade B signal coverage area; (3) the presence of a clear showing of a particularized need by the station requesting the change of market designation; and (4) an indication of benefit to the public from the proposed change. Each of these factors helps the Commission to evaluate individual market conditions consistent "with the underlying competitive purpose of the market hyphenation rule to delineate areas where stations can and do, both actually and logically, compete."[2]

4. Section 4 of the Cable Television Consumer Protection and Competition Act of 1992 ("Cable Act"),[3] which amended Section 614 of the Communications Act of 1934, as amended ("Act"), 47 U.S.C. §614, requires the Commission to make revisions needed to update the list of top 100 television markets and their designated communities in Section 76.51 of the Commission's Rules. *See* Section 614(f) of the Act.[4] The Commission stated that where sufficient evidence has been presented tending to demonstrate commonality between the proposed community to be added to a market designation and the market as a whole, such cases will be considered under an expedited rulemaking procedure consisting of the issuance of a Notice of Proposed Rule Making based on the submitted petition.

THE PETITION

5. In support of its proposal, First Century asserts that the current market designation does not reflect the competitive realities of the market. In this regard, it states that Concord is part of what is normally known as the Bay area, and is located 32 miles from San Francisco, 40 miles from San Jose, and 19 miles from Oakland. First Century further states that KFCB-TV, which began operating in 1985, places a Grade A signal over the three designated communities of the market, and that the Grade A signal contours of the stations licensed to San Francisco, Oakland and San Jose totally encompass Concord. First Century also notes that Arbitron includes KFCB-TV within the San Francisco-Oakland-San Jose Area of Dominant Influence

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[1] The Commission has delegated to the Chief, Mass Media Bureau, authority to act on petitions for rule making seeking market redesignation and has stated that it expects "that requests for specific hyphenated market changes that appear worthy of consideration will be routinely docketed and issued as rulemaking proposals." *See Report and Order* in MM Docket No. 92-259 (Broadcast Signal Carriage Issues), 8 FCC Rcd 2965, 2977-78, n.150 (1993).

[2] *See, e.g., TV 14, Inc. (Rome, Ga.)*, 7 FCC Rcd 8591, 8592 (1992), *citing Major Television Markets (Fresno-Visalia, California)*, 57 RR 2d 1122, 1124 (1985). *See, also, Press Broadcasting Company, Inc.*, 8 FCC Rcd 94, 95 (1993).

[3] Cable Television Consumer Protection and Competition Act, Pub. L. No. 102-385, 106 Stat. 1460 (1992).

[4] In connection with the implementation of the broadcast signal carriage provisions of the Cable Act, the Commission concluded that a major update of Section 76.51 was not necessary based on the record then before it. Nevertheless, the Commission did make some minor revisions to Section 76.51 of the Rules, and announced that it would consider further revisions to the list of television markets on a case-by-case basis. *See Report and Order* in MM Docket No. 92-259, *supra*.

(ADI). It states that KFCB-TV derives over 90 percent of its revenues from cities other than Concord within the market. First Century thus asserts that these communities do, in fact, comprise a single television market for purposes of competition for audience and economic support.

6. First Century contends that amendment of Section 76.51 of the Rules to include the community of Concord is essential to equalize competition for cable carriage among all the local television stations in the area. Specifically, it maintains that although KFCB-TV competes directly with other stations licensed to San Francisco, San Jose and Oakland, because Concord is not a designated community in the subject Section 76.51 market listings, the station is not a "local signal" for purposes of copyright purposes throughout the market.[5] As a result, it states, although KFCB-TV is entitled to carriage on cable systems within the ADI under the Commission's must-carry rules,[6] the station would nevertheless be considered a "distant signal" for cable systems within the ADI, but beyond 35 miles of Concord, thus placing the station at a significant competitive disadvantage with respect to other area stations.[7] First Century states that this disparate treatment of KFCB-TV as against the other market stations threatens the viability of KFCB-TV. By the proposed amendment of Section 76.51, First Century maintains that KFCB-TV would be deemed a local signal within the ADI and would be able to compete for audience and revenues on an equal basis with other stations in the market. Moreover, First Century states that the severe economic and competitive disadvantage it would be forced to operate under demonstrates the particularized need for redesignation of the market as proposed, and maintains that the public will substantially benefit by assured access to KFCB-TV's programming. Therefore, it asserts that redesignation of the market as proposed will not only place KFCB-TV on a level playing field with its competitors, but will also comport with the goal of assuring that local stations have access to cable subscribers and that subscribers have access to all stations in a television market.

DISCUSSION

7. Based on the facts presented, we believe that a sufficient case for redesignation of the subject market has been set forth so that this proposal should be tested through the rulemaking process, including the comments of interested parties. It appears from the information before us that KFCB-TV and stations licensed to communities in the San Francisco-Oakland-San Jose television market do compete for audiences and advertisers throughout much of the proposed combined market area, and that evidence has been presented tending to demonstrate commonality between the proposed community to be added to a market designation and the market as a whole. Moreover, First Century's proposal appears to be consistent with the Commission's policies regarding redesignation of a hyphenated television market.

ADMINISTRATIVE MATTERS

Ex Parte Rules -- Non-Restricted Proceeding

8. This is a non-restricted notice and comment rulemaking proceeding. *Ex parte* presentations are permitted, provided they are disclosed as provided in the Commission's Rules. *See generally* 47 C.F.R. §§ 1.1202, 1.1203 and 1.1206(a).

Comment Information

9. Pursuant to applicable procedures set forth in §§ 1.415 and 1.419 of the Commission's Rules, interested parties may file comments on or before **September 22, 1993,** and reply comments on or before **October 7, 1993**. All relevant and timely comments will be considered before final action is taken in this proceeding. To file formally in this proceeding, participants must file an original and four copies of all comments, reply comments, and supporting comments. If participants want each Commissioner to receive a personal copy of their comments, an original plus nine copies must be filed. Comments and reply comments should be sent to the Office of the Secretary, Federal Communications Commission, Washington, D.C. 20554. Comments and reply comments will be available for public inspection during regular business hours in the FCC Reference Center (Room 239) of the Federal Communications Commission, 1919 M Street, N.W., Washington, D.C. 20554.

Initial Regulatory Flexibility Analysis

10. We certify that the Regulatory Flexibility Act of 1980 does not apply to this rulemaking proceeding because if the proposed rule amendment is promulgated, there will not be a significant economic impact on a substantial number of small business entities, as defined by Section 601 (3) of the Regulatory Flexibility Act. A few television licensees and permittees will be affected by the proposed rule amendment. The Secretary shall send a copy of this *Notice of Proposed Rule Making,* including the certification,

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[5] Stations licensed to communities specifically designated in Section 76.51 are considered local for all cable systems within the 35-mile zones of all listed communities in a given hyphenated market. The absence of Concord as a designated community in this market list results in KFCB-TV's classification as a "distant signal" for market-area cable systems more than 35 miles from Concord.

[6] *See* Section 76.56(b) of the Commission's Rules. First Century notes that KFCB-TV is entitled to carriage on cable systems within the San Francisco-Oakland-San Jose ADI regardless of whether the market is redesignated -- the issue presented here is the cost of such carriage. Nevertheless, First Century contends that redesignation of the market will entitle KFCB-TV to be carried on many more ADI-area cable systems without obligating it to indemnify many cable systems for the increased copyright liability -- the asserted crux of its need for the requested action. Moreover, First Century states that amendment of Section 76.51 as proposed will neither result in cable carriage of KFCB-TV beyond the station's Grade B signal contour nor alter the number of cable systems on which KFCB-TV may be carried.

[7] Under the provisions of Section 76.55(c)(2) of the Rules, a local commercial television station otherwise entitled to mandatory carriage need not be carried on market-area cable systems if the station is considered a "distant signal" under the copyright compulsory license (17 U.S.C. §111) and the station does not agree to indemnify the cable operator for the increased copyright liability. *See Report and Order* in MM Docket No. 92-259, 8 FCC Rcd at 2973-74.

to the Chief Counsel for Advocacy of the Small Business Administration in accordance with paragraph 603(a) of the Regulatory Flexibility Act. Pub. L. No. 96-354, 94 Stat. 1164, 5 U.S.C. Section 601 *et seq.* (1981).

Additional Information

11. For additional information on this proceeding, contact Alan E. Aronowitz, Mass Media Bureau, (202) 632-7792.

FEDERAL COMMUNICATIONS COMMISSION

Roy J. Stewart
Chief, Mass Media Bureau

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

CHARTWAYS TECHNOLOGIES, INC.,
Complainant,

v. File No. E-88-72

AT&T COMMUNICATIONS,
Defendant.

MEMORANDUM OPINION AND ORDER

Adopted: August 11, 1993; Released: August 19, 1993

By the Commission:

I. INTRODUCTION

1. In its application for review, Chartways Technologies, Inc. ("CTI")[1] asks us to rule that the Common Carrier Bureau ("Bureau") erred in determining that the defendant, AT&T Communications ("AT&T"), did not violate Sections 201(b) or 202(a) of the Communications Act[2] when it held CTI liable for charges associated with unauthorized calls placed through CTI's telephone system.[3] Specifically, CTI alleges that the Bureau erred by: (1) refusing to hold this proceeding in abeyance pending the outcome of a separate proceeding on toll fraud; (2) ruling that the applicable AT&T tariff provisions were not unlawfully vague; (3) finding that CTI had control over its private branch exchange ("PBX"), through which the unauthorized calls were placed; and (4) determining that AT&T's practices were not unreasonably discriminatory in treating CTI differently from calling card customers. For the reasons discussed below, we deny CTI's application.

II. BACKGROUND

2. The facts of this proceeding are based primarily on joint stipulations filed by the parties and, as such, are largely undisputed. The stipulated facts show that in May 1986, CTI, a Rockville, Maryland computer software services company, subscribed to AT&T's 800 Service under AT&T Tariff F.C.C. No. 2 and Long Distance Message Telecommunications Service ("LDMTS") under AT&T Tariff F.C.C. No. 1.[4] These services were connected to CTI's Northern Telecom PBX located on its premises. CTI, with the assistance of Northern Telecom, added a remote access feature, Direct Inward System Access ("DISA"), to its PBX. This feature allowed off-premises callers with the proper CTI-issued authorization codes to access AT&T's LDMTS and, thus, make interexchange calls that would be billed to CTI's dial station.

3. On March 31, 1988, AT&T notified CTI that an unusual volume of calls to Pakistan was originating at CTI's PBX. CTI informed AT&T that the calls were unauthorized and that its PBX contained a remote access feature through which the calls could have been placed. AT&T responded that it had no knowledge of the remote access feature and that CTI would be liable for charges associated with the unauthorized calls. On April 4, 1988, after the United States Secret Service had completed an investigation of the continuing unauthorized calls, CTI chose to disconnect the 800 Service and the remote access feature from its PBX. On the same day, AT&T again informed CTI that it would be held liable for the charges resulting from the disputed calls. CTI was billed in the ordinary course of business for the disputed calls. The charges associated with those calls are $7,436.71 for 800 Service calls and $81,788.90 for LDMTS calls.[5]

4. CTI filed a formal complaint in May 1988, alleging that AT&T was violating Sections 201(b) and 202(a) of the Communications Act by attempting to hold CTI liable for the disputed charges. In support of its claims, CTI first argued that it had taken all reasonable precautions to prevent unauthorized access to its PBX and that AT&T should have notified CTI of the need to take extraordinary measures to combat the toll fraud problems already known to AT&T.[6] Next, CTI asserted that the AT&T tariff provisions under which the disputed charges were levied are unlawfully ambiguous because they do not explicitly impose liability on the customer for unauthorized calls.[7] Finally, CTI contended that AT&T was acting in an unreasonably discriminatory manner by holding CTI wholly liable for unauthorized calls while limiting the liability of calling card customers to $50.00 for such calls.[8] In addition, CTI filed a motion on April 12, 1991, requesting that this complaint proceeding be held in abeyance pending final Commission action on the Pacific Mutual Life Insurance Company's petition for declaratory ruling regarding toll fraud issues.[9] In response, AT&T argued that its tariff provisions clearly and unambiguously required CTI to pay for the calls in question, that CTI, not AT&T, was responsible for securing CTI's telephone equipment, that AT&T acted lawfully in treating CTI differently from calling card cus-

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[1] CTI was formerly known as Sage Federal Systems, Inc.

[2] 47 U.S.C. §§ 201(b), 202(a).

[3] *See* Chartways Technologies, Inc. v. AT&T Communications, 6 FCC Rcd 2952 (Com. Car. Bur. 1991) (hereinafter *Chartways*).

[4] CTI subscribed to AT&T's 800 Service to allow its customers to call CTI's offices without charge. Stipulated Fact 3. LDMTS enables users of CTI's telephone system to place calls over AT&T's long distance network. Under the applicable tariffs, CTI would, as the subscriber, pay for calls utilizing either service. *See* Stipulated Facts 8(a), 37(a).

[5] *See* Stipulated Facts 12, 14, 40, 42.

[6] CTI Brief at 7-10; CTI Reply Brief at 12, 17-19.

[7] CTI Brief at 10-11; CTI Reply Brief at 5-10.

[8] CTI Brief at 11-12; CTI Reply Brief at 14-17.

[9] *See* Public Notice, DA 91-284, 6 FCC Rcd 1545 (1991) (seeking comment on the Pacific Mutual petition) (hereinafter *Pacific Mutual*). Among the issues in *Pacific Mutual* are whether certain AT&T tariff provisions are unlawful and whether responsibility for toll fraud liability and prevention should be allocated among carriers, customers, and others.

tomers, and that the public interest required that CTI be held liable for the disputed charges.[10] AT&T also opposed CTI's motion to hold this proceeding in abeyance.

III. THE BUREAU'S DECISION

5. On May 29, 1991, the Bureau released a decision denying CTI's complaint and concluding that CTI had failed to show violations of either Section 201(b) or 202(a). The Bureau first rejected the argument that the tariff provisions at issue were unlawfully vague, finding that they "clearly impose liability on subscribers for tariffed charges associated with 800 Service and LDMTS usage (including all calls originated at the subscriber's number), except in those instances where exceptions to the general payment obligations are explicitly stated."[11] Next, the Bureau found that CTI had failed to show that AT&T had been "negligent in any way with regard to the unauthorized calls" or had "engaged in any unjust and unreasonable practices within the contemplation of Section 201(b)."[12] The Bureau noted that "[t]here is no dispute that CTI at all times had the capability to restrict access to and egress from its PBX."[13] Finally, the Bureau determined that AT&T had not violated Section 202(a) by treating CTI differently from calling card customers with regard to liability for unauthorized calls.[14] The Bureau explained that AT&T, in its role as a provider of LDMTS and 800 Service, did not have the same control over use of those services that it did over use of its calling card services. AT&T could, as a calling card issuer, invalidate cards that were being used fraudulently. By contrast, AT&T has "neither the ability nor the right to exercise control over use of [CTI's] remote access feature. ... [AT&T] merely provides services that can be accessed through the remote feature [of CTI's PBX] and absent some prior arrangement or notification by CTI, would have neither the basis nor the right to question or restrict completion of calls placed through CTI's dial station."[15] The Bureau noted that the statutory limit on the liability of calling card customers for unauthorized calls does not apply to customers of other services.[16] In addition, the Bureau denied CTI's motion to hold the proceeding in abeyance pending Commission action on the *Pacific Mutual* petition.[17] The Bureau stated that all issues underlying CTI's complaint had been fully briefed and that it saw no reason to delay a decision on the specific facts in the *Chartways* proceeding while awaiting resolution of an unrelated proceeding that could lead to rules and policies of general applicability. On June 28, 1991, CTI filed an application for review of the Bureau's decision.

IV. DISCUSSION

A. Deferral Pending Action on the Pacific Mutual Petition.

6. *Contentions of the parties.* As a threshold matter, CTI first raises the issue of whether the Bureau should have held this proceeding in abeyance pending Commission action on the *Pacific Mutual* petition, contending that the issues raised by the petition are directly related to this proceeding.[18] CTI argues that the Bureau's decision prejudges or potentially preempts the *Pacific Mutual* issues: for example, the petition requests a declaration that certain AT&T tariff provisions are ambiguous and unlawful, which is one of CTI's contentions here. CTI also asserts that both this proceeding and *Pacific Mutual* raise the issue of spreading the burden of toll fraud costs among various entities. Further, CTI maintains that the Commission does not have established policies on the lawfulness of the applicable AT&T tariff provisions or on the allocation of the costs of toll fraud and that the *Pacific Mutual* proceeding will result in such policies. CTI warns that this complaint proceeding should be held in abeyance to avoid establishing a precedent that may be inconsistent with the policies likely to be adopted in *Pacific Mutual*.

7. In its opposition, AT&T argues that the Bureau's decision does not improperly prejudge issues raised in the *Pacific Mutual* proceeding.[19] AT&T asserts that any new policies adopted in *Pacific Mutual* would have prospective application only and, thus, could not affect this complaint proceeding, which concerns past conduct. According to AT&T, there is no reason to delay resolution of CTI's complaint merely because another proceeding involving different facts was initiated in the interim.

8. *Decision.* Like the Bureau,[20] we are not persuaded that prior Commission action on the *Pacific Mutual* petition is necessary for the "full and fair" resolution of CTI's complaint. The parties completed the factual record in this proceeding by filing a joint stipulation of facts on which the Bureau based its analysis of the issues herein. Moreover, the parties made their legal and factual arguments in detailed briefs that were filed in addition to the standard pleadings of a complaint proceeding. Given this extensive record, we agree with the Bureau's view that there is no reason to delay action on CTI's complaint, which involves very specific facts, while we consider *Pacific Mutual*, an independent proceeding that may lead to the establishment of rules and policies of general applicability. As for the argument that the Bureau decision prejudges the matters at issue in *Pacific Mutual*, we stress that any conclusions reached in this proceeding do not preclude the establishment of rules and policies based specifically on the record developed in the *Pacific Mutual* proceeding.[21]

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[10] AT&T Brief at 10-22.
[11] *Chartways*, 6 FCC Rcd at 2954.
[12] *Id.*
[13] *Id.* (citing Stipulated Fact 21).
[14] *Id.*
[15] *Id.*
[16] *Id.* (citing Truth in Lending Act, 15 U.S.C. § 1643); *see also* 12 C.F.R. § 226.12(b)(1) (cardholder liability is $50.00 for unauthorized use of calling card).
[17] *Chartways*, 6 FCC Rcd at 2952 n.2.
[18] CTI Application at 5-10.
[19] AT&T Opposition at 14-15.
[20] *Chartways*, 6 FCC Rcd at 2952 n.2.
[21] *Accord id.* at 2955 n.25. In addition to the record in the *Pacific Mutual* proceeding, the Commission has opened a general record on toll fraud. *See* Public Notice, DA 92-1464 (released October 22, 1992). Included in the latter record are the written remarks and other materials submitted by the panelists from the Commission's *en banc* hearing on toll fraud that was held on October 9, 1992. At the hearing, panelists representing telecommunications users, carriers, equipment vendors, law enforcement organizations, and others presented diverse perspectives and detailed information on toll fraud issues.

B. AT&T Tariff Provisions.

9. *Contentions of the parties.* Next, CTI argues that the Bureau erred by ruling that the applicable AT&T tariff provisions were not unlawfully vague.[22] CTI contends that these tariff provisions are, in fact, vague because they do not contain a complete list of exceptions to the general payment obligation. According to CTI, AT&T acknowledged in its brief in this proceeding that exceptions exist that are not listed in the tariff provisions.[23] CTI maintains that the tariff provisions are therefore "ambiguous" and failed to give CTI notice that it would be liable for unauthorized calls. CTI further asserts that under Section 61.2 of our rules,[24] the tariffs should have contained "clear and explicit" language regarding liability for fraudulent calls.

10. In response, AT&T argues that the general payment obligation of a tariff is applicable in the absence of an explicit exception and that no such exception exists for unauthorized calls under the tariff provisions in question.[25] AT&T also notes that there is no legal requirement that tariffs list all types of calls that are subject to a general payment obligation. CTI replies that payment is not due under the tariff provisions because the disputed calls did not "originate" at CTI's number, as required by AT&T Tariff F.C.C. No. 1.[26] Instead, CTI claims, these calls originated at unknown remote numbers and were routed to the CTI PBX via AT&T's 800 Service. CTI maintains that, in this context, the meaning of "originate" is itself vague. Further, CTI asserts that the precedents cited by AT&T to support the general payment obligation are inapposite because they do not concern PBX toll fraud.[27]

11. *Decision.* We find that the Bureau was correct in determining that the tariff provisions at issue are consistent with the requirements of Sections 61.2 and 61.54(j) of our rules.[28] The general payment obligation of each provision is clear and definite. Under AT&T Tariff F.C.C. No. 1, Section 2.4.1.A, the "Customer is responsible for the payment of bills for LDMTS. This includes payment for LDMTS calls or services: originated at the Customer's number(s)...." AT&T Tariff F.C.C. No. 2, Section 2.4.1.A provides that the "Customer is ... responsible for the payment of bills for [800 Service]." As the parties agreed in their stipulated facts, neither of these tariffs contains an exception for unauthorized usage.[29] In the absence of such an exception, the clear meaning of the relevant tariff provisions is that the customer's obligation includes liability for unauthorized usage involving incoming 800 Service calls or LDMTS calls that originate at the customer's numbers. CTI has failed to persuade us that the tariffs are unlawfully vague and ambiguous because they do not specify that the customer is liable for unauthorized usage of LDMTS or 800 Service.[30]

12. Further, we do not agree with CTI's contention that the tariff provisions are ambiguous because AT&T has allegedly acknowledged, in its brief in this proceeding, an "exception" to the general payment obligation that is not stated in the tariffs. In its brief, AT&T stated that it "assumes responsibility for costs caused by the compromise of an AT&T network instrumentality, *e.g.*, deception of an AT&T operator or clip-on to an AT&T cable."[31] The parties apparently agree that this AT&T policy is not substantively relevant to this proceeding, even if it is intended as an exception to the general payment obligation.[32] We conclude that the failure to state this policy as an exception to the tariff obligations should affect only the policy's status as an valid exception. Its absence from the tariffs does not alter the clarity of the stated tariff obligations and exceptions.

13. CTI also contends that because the disputed calls did not "originate" at its number, it is not liable for the charges associated with the calls. Implicit in this argument is the assumption that each disputed call combined both 800 Service and LDMTS. Under the facts before us, however, we find that each disputed 800 Service call is separate and distinguishable from the corresponding disputed LDMTS call.[33] For 800 Service, there is no requirement under the relevant tariff provision[34] that a call originate at the customer's number before the customer can be liable for the charges, because 800 Service calls always *terminate* at the customer's number. Moreover, because 800 Service, by its very nature, is designed to allow callers unknown to the customer to use the service, the customer has, by subscribing to the service, implicitly authorized any call utilizing the service. As for the disputed LDMTS calls, the parties have stipulated that the unauthorized callers "obtained a local dial tone from the [CTI] premises and originated LDMTS calls from [CTI's] numbers."[35] Hence, we must reject CTI's contention that it is not liable for the disputed LDMTS calls because they did not originate at CTI's numbers.

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[22] CTI Application at 10-12.

[23] *Id.* at 11 (quoting AT&T Brief at 20 n.*: "AT&T assumes responsibility for costs caused by the compromise of an AT&T network instrumentality, *e.g.*, deception of an AT&T operator or clip-on to an AT&T cable.").

[24] 47 C.F.R. § 61.2.

[25] AT&T Opposition at 6-7.

[26] CTI Reply at 3.

[27] *Id.* at 3-4.

[28] 47 C.F.R. §§ 61.2, 61.54(j). Section 61.2 states that "[i]n order to remove all doubt as to their proper application, all tariff publications must contain clear and explicit explanatory statements regarding the rates and regulations." Section 61.54(j) provides in pertinent part: "The general rules..., regulations, exceptions, and conditions which govern the tariff must be stated clearly and definitely. All general rules, regulations, exceptions or conditions which in any way affect the rates named in the tariff must be specified."

[29] Stipulated Facts 8(b), 37(b).

[30] We note that AT&T has cited authorities that discuss general payment obligations. *See* AT&T Brief at 11-13 (citing Crawford County v. Bushmiaer, 31 S.W. 2d 144, 145 (Ark. 1930); Sonstegard v. General Telephone Co., 273 N.E. 2d 151, 152 (Ohio Ct. Common Pleas 1969); Gaither v. Mountain States Telephone and Telegraph Company and AT&T Communications, Case No. GNR-T-88-4, Order No. 22068 (Idaho P.U.C., August 12, 1988); Amaral v. AT&T Communications, Inc., D.P.U. 87-53-I (Massachusetts D.P.U., July 1, 1987)). As asserted by CTI, these cases do not concern PBX toll fraud. Nonetheless, they provide some support for AT&T's interpretation of the general payment obligation.

[31] AT&T Brief at 20 n.*.

[32] *See* AT&T Opposition at 7-8; CTI Reply at 3-4.

[33] *See* Stipulated Facts 3, 5, 35 (CTI intended that 800 service be used by any "customer" to call CTI premises at no charge; 800 service terminated at CTI's PBX; unauthorized callers obtained local dial tone from the CTI premises and originated LDMTS calls from CTI's numbers).

[34] *See* AT&T Tariff F.C.C. No. 2, Section 2.4.1.A.

[35] Stipulated Fact 35.

C. Control Over CTI's PBX Equipment.

14. *Contentions of the parties.* CTI argues that the Bureau erred in finding that CTI had control over its PBX.[36] According to CTI, it had little actual control over access to its PBX and had no knowledge of the toll fraud risks. CTI asserts that AT&T did have knowledge of toll fraud problems involving PBXs and its 800 Services and that AT&T therefore had an obligation to disclose those risks, including the potential liability, to its customers. Further, CTI contends that AT&T was, in fact, able to detect the unusual calling patterns through CTI's PBX and should have informed CTI as soon as these calls began. CTI maintains that AT&T's ability to detect the unusual calling patterns is evidence of AT&T's control over access to CTI's PBX. CTI claims that in asking for relief from liability, it is not advocating a "blanket policy of indemnification for unauthorized calls" but is requesting that the "burden [be] shouldered by the universe of customers, not innocent victims."[37]

15. In response, AT&T notes that CTI stipulated that it "at all times had the capability to restrict access to and egress from its PBX."[38] AT&T further notes that CTI stipulated that it could have changed authorization codes for the PBX remote access feature at any time and was capable of monitoring calls through the PBX in real time.[39] By contrast, AT&T claims that it was unable to monitor calls in real time because the call detail was typically recorded on tape by the local exchange carrier and then delivered to AT&T later for billing purposes.[40] AT&T also asserts that only the customer can identify unauthorized calling, even when AT&T has detected an unusual calling pattern.[41] AT&T denies that it is in a position to recommend security measures to its customers, who employ a "broad array" of equipment.[42] In its reply, CTI repeats that AT&T was aware of toll fraud risks and should have warned customers about them, even if it could not recommend specific security measures.[43]

16. *Decision.* CTI's arguments present three issues: whether CTI had the ability to control calling through its PBX, whether AT&T was negligent with regard to the disputed calls, and whether AT&T had, more generally, a duty to warn CTI about the risks of toll fraud. Based on the record before us, we find that CTI did, at all times, have "the capability to restrict access to and egress from its PBX," as one stipulation explicitly states.[44] CTI has agreed that it could have changed the authorization code of the PBX's remote access feature, which it or the PBX manufacturer had devised, could have disabled the remote access feature altogether, and could have monitored remote access calls through the PBX in real time, by use of a Station Message Detail Recorder, for example.[45] It is also undisputed that CTI's PBX was capable of restricting off-premises callers from receiving local dial tone, completing certain classes of long distance calls, and accessing AT&T's long distance service.[46] Further, CTI "at any time could have physically disconnected its 800 Service [from its PBX] and stopped the unauthorized calls."[47] These stipulated facts disclose that the unauthorized calls were placed by accessing AT&T's long distance service through the remote access feature of CTI's PBX and that CTI had the actual ability to prevent such calls or to detect them as they were occurring. Moreover, we agree with the Bureau's finding that CTI has presented no persuasive evidence that AT&T was negligent with regard to the unauthorized calls.[48] The record shows that AT&T did not have the ability to determine whether particular 800 or LDMTS calls were authorized or to monitor LDMTS calls in real time.[49] The record also shows that AT&T did not represent to its customers that it had such capabilities. More generally, CTI fails to cite any authority or provide a persuasive argument to support its contention that AT&T had, at the time these fraudulent calls occurred, an affirmative duty to warn CTI about toll fraud risks. Further, the 1 facts of this proceeding do not indicate that AT&T acted unreasonably in its communications with CTI. The record does not demonstrate any failure by AT&T to comply with any existing disclosure obligation imposed by the Commission or required by Section 201(b) of the Act, nor does the record show that AT&T had any basis for questioning CTI's choices about which security measures to implement in connection with CTI's own telecommunications equipment. We think it significant that CTI, with the assistance of Northern Telecom, installed CTI's PBX system without consulting AT&T in any way and that this equipment then provided the point of vulnerability to fraudulent calling. Based on the evidence before us, we find that the Bureau was correct in concluding that CTI had control over its PBX system and that CTI failed to demonstrate that AT&T had engaged in any unjust or unreasonable practices under Section 201(b) of the Act.[50]

D. Discrimination in Comparison to Calling Card Services.

17. *Contentions of the parties.* Finally, CTI argues that the Bureau erred in finding that it was not unreasonably discriminatory, under Section 202(a) of the Act, for AT&T to

[36] CTI Application at 13-16.
[37] *Id.* at 15-16.
[38] AT&T Opposition at 8 (quoting Stipulated Fact 21).
[39] *Id.* at 8-9 (citing Stipulated Facts 24, 50, 66).
[40] *Id.* at 10.
[41] *Id.*
[42] *Id.* at 11 & n. **** (AT&T was unaware of CTI's remote access feature until CTI denied authorizing the calls in dispute herein).
[43] CTI Reply at 4-5.
[44] Stipulated Fact 21.
[45] *Id.* at 22, 24, 27, 50, 66. Station Message Detail Recorders and equivalent equipment can alert customers in real time to calls deviating from customer-authorized parameters such as call destination, holding time, origination point, and frequency of authorization code use. *Id.* at 50. CTI claims that AT&T never informed it of the availability of such equipment. *See id.* at 51. CTI cites no authority, however, to support its implicit contention that AT&T had a duty to advise CTI about such customer-premises equipment. Further, the record shows no attempt by CTI to seek advice from AT&T when CTI and Northern Telecom, the equipment manufacturer, installed CTI's PBX system.
[46] *Id.* at 29.
[47] *Id.* at 18.
[48] *Chartways*, 6 FCC Rcd at 2954.
[49] Stipulated Facts 15, 45, 52.
[50] In addition, CTI has suggested that the burden of unauthorized calls be "shouldered by the universe of customers." CTI Application at 15-16. Such a broad policy question is not normally decided in the context of a complaint proceeding, and we decline to do so here. We note, however, that this particular issue is being considered in the *Pacific Mutual* proceeding, and the decision adopted within the context of this complaint proceeding in no way prejudges questions being addressed in *Pacific Mutual*.

limit the liability of calling card customers for the unauthorized use of their cards while holding dial station customers such as CTI fully liable for unauthorized use.[51] Under the Truth in Lending Act and Federal Reserve Board regulations, a cardholder's liability for the unauthorized use of a credit card, including a telephone company calling card, is limited to $50.00.[52] CTI contends that the absence of such a liability limit for non-card services does not justify differing treatment. CTI believes that the calling card and non-card services should be offered under the same terms because customers view the two services as being identical. CTI also asserts that the rates for calling card and non-card services are the same. Further, CTI maintains that the fact that AT&T discovered unauthorized calling through CTI's PBX demonstrates that AT&T had control over access to and egress from the PBX much like its control over use of the AT&T calling card services.

18. AT&T responds that calling card and non-card services are not "like" services.[53] AT&T points out that calling card calls, unlike non-card calls, are always screened before completion by checking a data base that indicates card validity and whether excessive usage of the card has occurred. AT&T notes that the rates for calling card services are different from those for non-card services and that customers perceive the services to be different.[54] AT&T also emphasizes that calling card liability is subject to unique statutory restrictions that are not applicable to non-card services.[55] In addition, AT&T asserts that as the issuer of calling cards, it has a degree of control over their use that it does not have over the use of a customer's dial station, which the customer controls.[56]

19. *Decision.* We are persuaded that the Bureau was correct in finding that AT&T's practices here did not constitute unreasonable discrimination under Section 202(a) of the Act. A customer's liability for unauthorized use of calling card services is determined by statute and is subject to specific restrictions under the Truth in Lending Act and Federal Reserve Board regulations. AT&T has no discretion to adopt a higher liability limit. Further, these liability restrictions on their face do not apply to non-card services. Hence, by applying the liability restrictions only to calling card services, AT&T is acting pursuant to the explicit terms of the applicable statute and regulations, rather than exercising its own discretion in an unreasonably discriminatory manner. Moreover, AT&T, as a calling card issuer, has not only the right but also the means to monitor card usage for unauthorized use and to invalidate cards when such use is discovered. Thus, it is reasonable to require AT&T to limit the liability of calling card customers for charges associated with unauthorized use. As discussed above,[57] however, the record shows that AT&T did not have the same monitoring capability with regard to the 800 and LDMTS usage at issue here, and AT&T did not represent these services to their customers as having such a monitoring capability.[58] Further, it has been stipulated that CTI, not AT&T, controlled access to and egress from CTI's PBX, which was the gateway to AT&T's long distance service.[59] CTI was responsible for devising the authorization code for the PBX's remote access feature and also had the ability to monitor traffic through its PBX in real time.[60] AT&T merely provided services that were accessed through CTI's PBX and was not in a position analogous to its role as a calling card issuer, where it, rather than the customer, controls access to long distance services.[61]

20. We also find unpersuasive CTI's argument that customers view calling card and non-card services as being identical. Calling card services, unlike non-card services, generally involve live or automated operator assistance, with the customer being required to disclose billing information. In addition, the record contains the undisputed fact that charges for the services differ.[62] Given the preceding facts, we find that the AT&T practices at issue here did not constitute unreasonable discrimination under Section 202(a) of the Act.[63]

V. CONCLUSION

21. Based on the record before us, we find that the Bureau was correct in determining that AT&T did not violate Sections 201(b) or 202(a) of the Communications Act when it required payment from CTI for charges associated with unauthorized calls placed through CTI's PBX. Specifically, we have concluded that the instant proceeding should not be held in abeyance pending Commission action on the unrelated *Pacific Mutual* petition, that the relevant AT&T tariff provisions are not unlawfully vague and ambiguous with regard to charges for unauthorized calls, that CTI rather than AT&T controlled access to and egress from CTI's PBX, and that AT&T's practice of limiting the liability of calling card customers, but not dial station customers, for unauthorized calls was not unreasonably discriminatory.

VI. ORDERING CLAUSES

22. Accordingly, IT IS ORDERED, pursuant to Section 4(i) of the Communications Act of 1934, as amended, 47 U.S.C. § 154(i), that the Application for Review filed by Chartways Technologies, Inc. on June 28, 1991, IS DENIED.

23. IT IS FURTHER ORDERED that the Motion for Stay filed by Chartways Technologies, Inc. on June 28, 1991, IS DISMISSED.

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[51] CTI Application at 16-18.
[52] 15 U.S.C. § 1643; 12 C.F.R. § 226.12(b)(1).
[53] AT&T Opposition at 12.
[54] *Id.* at 13.
[55] *Id.*
[56] *Id.* at 14.
[57] *See* paras. 15-16, *supra.*
[58] Stipulated Facts 15, 45.
[59] *Id.* at 21.
[60] *Id.* at 22, 66.
[61] *Accord Chartways,* 6 FCC Rcd at 2954.
[62] *See* Letter from David A. Irwin to Howard Wilchins, Deputy Chief, Enforcement Division, Common Carrier Bureau, FCC, dated November 15, 1989 (CTI acknowledges that an additional service charge applies to calling card calls that does not apply to dial station calls).
[63] In light of our action herein, we dismiss as moot CTI's motion for stay of the Bureau decision in *Chartways* pending a Commission ruling on CTI's application for review. We also dismiss, as unauthorized by our rules, comments on the application for review that were filed by non-parties. *See* 47 C.F.R. § 1.115(d) (only oppositions may be filed in response to applications).

24. IT IS FURTHER ORDERED that the comments filed by the Pacific Mutual Life Insurance Company, Mitsubishi International Corporation, Credit Card Calling Systems, Inc., and the TTX Company, ARE DISMISSED.

FEDERAL COMMUNICATIONS COMMISSION

William F. Caton
Acting Secretary

Before the
Federal Communications Commission
Washington, D.C. 20554

In re Applications of

HERITAGE-WISCONSIN BROADCASTING CORP.[1] File Nos. BTC-920305KY BTCH-920305KZ

For Transfer of Control of Licenses of Stations WEMP/WMYX-FM Milwaukee, Wisconsin from James M. Hoak, Jr.[2] to Shareholders of Heritage Media Corporation

WIL MUSIC, INC. File Nos. BTC-920305KV BTCH-920305LC

For Transfer of Control of Licenses of Stations WRTH/WIL-FM St. Louis, Missouri from James M. Hoak, Jr. to Shareholders of Heritage Media Corporation

WBBF, INC. File Nos. BTC-920305KX BTCH-920305KW

For Transfer of Control of Licenses of Stations WBBF/WBEE-FM Rochester, New York from James M. Hoak, Jr. to Shareholders of Heritage Media Corporation

WEAR-LTD. File Nos. HBRCT-910930KW BTC-920305KQ

For Renewal and Transfer of Control of License of Station WEAR-TV Pensacola, Florida from James M. Hoak, Jr. to Shareholders of Heritage Media Corporation

HERITAGE MEDIA SERVICES File Nos. BTC-920305KI BTCH-920305KJ

For Transfer of Control of Licenses of Stations KULL/KRPM-FM Seattle and Tacoma, Washington from James M. Hoak, Jr. to Shareholders of Heritage Media Corporation

MEMORANDUM OPINION AND ORDER
AND NOTICE OF APPARENT LIABILITY

Adopted: July 16, 1993; Released: August 2, 1993

By the Commission: Commissioner Barrett dissenting in part and issuing a statement.

INTRODUCTION

1. The Commission has before it for consideration: (i) applications for the transfer of control of licenses of the above-listed broadcast stations; (ii) a license renewal application for station WEAR-TV, Pensacola, Florida; (iii) a timely filed Petition to Deny by the local branches of the NAACP located in Milwaukee, Wisconsin; St. Louis, Missouri; Rochester, New York; Pensacola, Florida; and Seattle, Washington, (collectively "NAACP"), against the license transfer of control applications of the above-listed broadcast stations; (iv) a timely filed Petition to Deny by the Florida State Conference of Branches of the NAACP and the Pensacola Branch of the NAACP against WEAR-TV's renewal application; (v) oppositions filed by the licensees; (vi) the NAACP's reply to the licensees' opposition regarding the transfer of control applications; (vii) the licensees' responses to staff letters of inquiry; and (viii) the NAACP's comments on the licensees' responses to the staff inquiry.

II. BACKGROUND

2. The NAACP alleges that, since Heritage Media Corporation assumed control of these broadcast stations, it has eliminated the stations' EEO programs and deliberately reduced the proportional and numerical representation of minorities across the board. As support, the NAACP points to the decline in cumulative minority employment from 16 when the stations were acquired to five in 1991[3] while total employment increased. It alleges that the EEO violations are systematic and are manifested at all radio stations, which are operated within large communities, as well as at WEAR-TV. The NAACP requests that we investigate the employment practices of these stations pursuant to *Bilingual Bicultural Coalition on Mass Media, Inc. v. FCC*, 595

[1] Heritage Media Corporation, directly or indirectly, owns 100% of the issued and outstanding stock of the licensee corporations which operate these stations.

[2] James M. Hoak, Jr., who currently owns 59.04% of Heritage's voting stock, proposes to transfer control of the corporation to the shareholders. At completion of this transaction, Mr. Hoak will own only 10.35% of Heritage's voting stock.

[3] The dates of acquisition are as follows: Stations WEMP/WMYX-FM, WRTH/WIL-FM, and WBBF/WBEE-FM on December 31, 1986; WEAR-TV on August 11, 1987, and KULL/KRPM-FM on September 26, 1988.

F.2d 621 (D.C. Cir. 1978) (*Bilingual*), designate the transfer of control applications and WEAR-TV's renewal application for hearing, and thereafter deny them. In addition, it requests that we require the radio stations to file early renewal applications pursuant to 47 C.F.R. Section 73.3539(c), designate the applications for hearing and then deny them.

3. The licensees deny the NAACP's allegations and argue that the petition against the transfer of control applications should be dismissed as procedurally defective. In addition, they argue that the NAACP has shown no compelling circumstances warranting departure from the Commission's standard practice of reviewing EEO performance at renewal, that there is no evidence justifying review of the stations' current performances, that all stations are in compliance with our EEO Rule, and, therefore, the NAACP's petition should be denied.

4. For the reasons discussed herein, we will deny the NAACP's petition against the transfer of control applications for Stations WEMP/WMYX-FM, deny its petitions against the applications for the remaining stations, and grant the stations' applications with appropriate remedies and sanctions.

III. PLEADINGS

5. *Standing.* In challenging an application pursuant to Section 309(d)(1) of the Communications Act, a petitioner must demonstrate party in interest status. In addition, a petitioner must, as a threshold matter, submit "specific allegations of fact sufficient to show that a grant of the application would be *prima facie* inconsistent with [the public interest, convenience and necessity]." 47 U.S.C. Section 309(d)(1). *See also Astroline Communications Co. Ltd. Partnership v. FCC,* 857 F.2d 1556 (D.C. Cir. 1988) (*Astroline*); *Application of Dubuque T.V. Limited Partnership and Sage Broadcasting Corporation of Dubuque, Iowa for Assignment of Television License for KDUB-TV, Dubuque, Iowa,* 4 FCC Rcd 1999 (1989). The allegations, except for those of which official notice may be taken, must be supported by the affidavit of a person with personal knowledge of the facts alleged. 47 U.S.C. Section 309(d)(1).

6. Filed with the petition against the stations' transfer of control applications were timely-filed declarations under penalty of perjury from the presidents of each of the local NAACP branches operating within the service area of each of the designated stations. All of the declarations meet the requirement for establishing standing for the designated branch. *See American Legal Foundation v. FCC,* 808 F.2d 84 (D.C. Cir. 1987). We find, therefore, that the NAACP has established party-in-interest standing regarding each of these stations. Accordingly, we will treat its pleading as a petition to deny. *See* 47 C.F.R Section 73.3584.

7. Next, we note that the NAACP's petition against WEAR-TV's renewal application contained a timely-filed declaration under penalty of perjury from the President of the Florida State Conference of Branches of the NAACP. The Commission has held previously that the statement of a person, who does not claim to be a listener to the challenged stations or a resident within its service area, does not satisfy the standing requirements of the Act. *See Application of Certain Broadcast Stations Serving Communities in the States of Michigan and Ohio,* 3 FCC Rcd 6944 (1988); *see also Applications of KDEN Broadcasting Co. for Renewal of License of Stations KDEN, Denver, Colorado,* 55 Rad. Reg. 2d (P&F) 1311, 1311-1312 (1984). Accordingly, we find that the declaration of the President of the Florida State Conference of Branches of the NAACP, who does not claim to be a resident within the service area of or listener to WEAR-TV, does not establish standing. However, the declaration from the President of the Pensacola Branch does meet the requirement for establishing standing for the designated branch and for the Florida State Conference of Branches of the NAACP. We find, therefore, that the challenge filed by the Florida State Conference of Branches of the NAACP constitutes a valid petition to deny against WEAR-TV. Accordingly, we will treat the NAACP's pleading as a petition to deny. See 47 C.F.R. Section 73.3584.

IV. DISCUSSION

8. *Reconsideration of Previous License Term Activity.* The NAACP's allegations rest heavily on alleged EEO misconduct occurring during the previous license terms. Specifically, the NAACP relies substantially on the most recent renewal applications filed by the licensees as well as annual employment reports which document the stations' work forces during previous license terms. Each of the radio station's licenses were renewed without EEO conditions.[4] Indeed, the NAACP did not challenge the renewal of any of the radio licenses. The NAACP states that, because EEO deficiencies at the stations are company-wide, no inference should be drawn from its failure to challenge the renewals of the radio stations. It states that it did not challenge Stations WEMP/WMYX-FM, WRTH/WIL-FM and KULL/KRPM-FM because, at renewal time, the licensees had not then owned the stations long enough for a meaningful statistical pattern to have occurred. It did not challenge WBBF/WBEE-FM because the local NAACP branch elected to challenge four other Rochester stations which it felt were more egregious.

9. The licensees argue that the NAACP's petition against the radio stations' transfer of control applications is, in effect, an untimely filed petition for reconsideration and should be dismissed as procedurally defective. Noting that each of the radio stations was renewed recently, the licensees contend that the petition to deny is premised almost entirely on employment, recruitment, hiring and promotion data covering each of the station's previous license term. It notes that each of these stations' EEO records were reviewed for the previous license term; that each station's renewal of license was granted and that the NAACP presents no new relevant and probative evidence that was not before the Commission during renewal time. Moreover, it argues that the Commission's unconditional grant of the stations' licenses is binding and controlling and, absent a showing of compelling circumstances, the Commission is barred from reviewing EEO conduct during the previous license term.

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[4] The radio stations' licenses were renewed as follows: WEMP/WMYX-FM, Milwaukee, Wisconsin on November 20, 1989, and November 27, 1989, respectively; WRTH/WIL-FM, St. Louis, Missouri on November 18, 1990; WBBF/WBEE-FM, Rochester, New York on August 5, 1991, and May 17, 1991, respectively; and KULL/KRPM-FM, Seattle, and Tacoma, Washington on January 29, 1991.

10. In its reply, the NAACP contends that most of its petition relates to matters occurring since the last renewals and that the petition requests a hearing based on the licensee's long term record of "breaking promises made in its most recent renewal applications and Heritage's long term record of statistically documented discrimination." The NAACP notes that, because there is nothing in the *Memorandum of Understanding*[5] to prevent the EEOC from considering allegations of discrimination based in part on evidence that an employer discriminated while a licensee, it would be illogical for the FCC to refuse to consider allegations based in part on pre-renewal evidence. Next, it argues that the licensee has waived this argument because it apparently uses pre-renewal conduct as a defense to allegations of current EEO misconduct. Finally, the NAACP contends that even if its petition is time-barred, the merits must be considered because allegations of discrimination are always potentially disqualifying.

11. The NAACP had recent opportunity to raise allegations of employment discrimination and other EEO-related misconduct during the stations' previous license terms at renewal time. It decided against exercising this opportunity. Indeed, most of the information relied upon in the petition -- each station's renewal application and most of the annual employment reports -- were available at renewal time. In any event, we have reviewed the NAACP's allegations, and conclude they do not raise a substantial question of fact regarding the licensees qualifications. In this regard, even during the prior term, all of the licensees recruited and employed minorities and there is no evidence of discrimination.

12. *Robinson Declaration.* As evidence that the licensees disregarded and abandoned their EEO programs during the current license terms, the NAACP submits a declaration from Ronda Robinson, who states that, on April 13, 1992, she contacted, by telephone, several recruitment sources listed in the licensees' most recent renewal applications and asked the person in charge of the employment program, "[w]hether to the best of their knowledge or recollection, they had been contacted by phone or mail, by the particular Heritage station in their market within the past year." Regarding Stations WEMP/WMYX-FM, unidentified persons at the NAACP and the *Milwaukee Courier* reported regular contact by the stations. The "representative" at the "SER" reported some contact but acknowledged "cursory" knowledge of such matters because he had recently assumed his position. Regarding Stations WRTH/WIL-FM, a director at the Urban League and an office manager at the *St. Louis American* acknowledged some contact by the stations. An unidentified person at the NAACP acknowledged contact "every once in a while" but also noted that it had recently moved to new offices. An unidentified person at the *St. Louis Argus* had no recollection of ever being contacted by the stations. Regarding Stations WBBF/WBEE-FM, the assistant personnel director at "Action For A Better Community" and the "person who reviews all job related material" at the Urban League could not recall ever being contacted. An unidentified person at Ibero American Action League "may" have received a notice in 1991, but did not recall receipt of one in 1992. An unidentified person at Spanish Action Coalition reported regular contact from WBEE, but not from WBBF. An unidentified person at the Puerto Rican Youth Development reported contact "two months ago" from WBEE. With respect to WEAR-TV, an unidentified person at the NAACP (Mobile Chapter) and an administrative assistant at the Escambia Pensacola Human Relations Commission (HRC) reported some contact, but HRC noted that "this was only after WEAR-TV's much publicized job hiring practices." Regarding KULL/KRPM-FM, a "representative" at the *Seattle Chinese Post* and an unidentified person at the Urban League could not respond due to a large amount of mail; unidentified persons at the *Facts,* Pullayup Indian Education Board, Asian Counseling Referral Service, and the Employment Opportunities Center reported no contact; an unidentified person at the Seattle Indian Center reported a large volume of mail but had nothing on file from the stations; and an employment specialist at the United Indian of All Tribes Foundation did not recall receipt of any notices from the stations but acknowledged a large volume of mail. The NAACP states that this single declaration is far more efficient than submitting declarations from 19 recruitment sources. The licensees argue that the declaration demonstrates nothing but its own unreliability. In addition, they note that, in most cases, Ms. Robinson does not identify with whom she spoke and that most sources did not have immediate access to information to provide reliable answers to inquiries over the telephone.

13. We will not consider Ms. Robinson's statement. In most cases, Ms. Robinson does not identify the person with whom she allegedly spoke.[6] In addition, it is unclear how Ms. Robinson could ascertain, over the telephone, whether the recruitment sources were able to provide reasonably accurate information. Although the NAACP states that Ms. Robinson used a "uniform" standard, the nature of this standard is unclear. Accordingly, we find that Ms. Robinson's declaration has no probative value and will not be considered herein.

14. *Statistical Evidence.* In support of its allegation that Heritage engages in company-wide employment discrimination, the NAACP submits the declaration of Dr. Andrew Cherry, a statistician. Dr. Cherry concluded that there was less than a 2% chance that the decline in Black employment at the eight radio stations could have occurred by chance alone and that there was less than a 1% chance that the decline in all minority group employment could have occurred by chance alone. The licensees label this comparison as "meaningless" and "unfair." They suggest that the proper analysis would have been an analysis as to whether the stations' efforts met the FCC's requirements.

15. As the licensees correctly argue, the NAACP used a statistical analysis which the Commission does not employ. First, the statistics calculated by the NAACP are not based on the Commission's EEO guidelines. Moreover, a statistical disparity alone is not sufficient grounds to order a

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[5] *See Memorandum of Understanding between the Federal Communications Commission and the Equal Employment Opportunity Commission,* 70 FCC 2d 2320 (1978).

[6] Ms. Robinson fails to provide any identification of the person with whom she spoke for 14 sources. For two sources, she identifies the person as only a "representative." For five positions, she identifies the person's title and for one position, she identifies the person as only "[t]he person who reviews all job related material...." It is unclear, however, how Ms. Robinson determined that this unidentified person actually reviews all job related material.

hearing. *See National Black Media Coalition v. Federal Communications Commission*, 775 F.2d 342, 358 (D.C. Cir. 1985). When challenging an application, a petitioner must establish that granting the application is *prima facie* inconsistent with the public interest. 47 U.S.C. Section 309(d)(1).

16. *Prima Facie Case.* The NAACP derived its factual allegations from the licensees' EEO programs as reflected in their most recent renewal applications, the stations' annual employment reports from the last year under previous ownership, the last renewal applications filed by the previous licensees, Ms. Robinson's declaration, and Dr. Cherry's statistical analysis. *See* para. 14, *supra.* With respect to stations WEMP/WMYX(FM), the NAACP criticizes the stations' failure to approach parity[7] with the Milwaukee labor force and states that the number of minority employees at the stations has declined from four to two since the licensee assumed control. Our review of the stations' employment for years 1990, 1991, and 1992[8] reveals that minority full-time employment overall and in upper-level positions remained constant and that minorities have been employed at levels equal to at least 50% of parity during the current license term. Moreover, the NAACP has presented no evidence that the licensee is not engaging in EEO efforts. Accordingly, we find that the NAACP has not established a *prima facie* case demonstrating that unconditional grant of stations WEMP/WMYX(FM)'s transfer of control applications would be inconsistent with the public interest. Its petition against these stations is, therefore, denied. Section 309(d)(1) of the Communications Act, 47 U.S.C. Section 309(d)(1); *Astroline, supra.*

17. With respect to the remaining stations, our review of each licensee's EEO record led us initially to conclude that the NAACP presented a *prima facie* case demonstrating that unconditional grant of the transfer of control applications and WEAR-TV's renewal application would have been inconsistent with the public interest. Section 309(d)(1) of the Communications Act, 47 U.S.C. Section 309(d)(1); *Astroline, supra.*[9] Further inquiry was therefore necessary. *See Beaumont Branch of the NAACP and the National Black Media Coalition v. Federal Communications Commission*, 854 F.2d 501, 506 (D.C. Cir. 1988) (*Beaumont); Bilingual, supra.*

18. Section 73.2080 of the Commission's Rules requires that a broadcast licensee refrain from employment discrimination and establish and maintain an affirmative action program reflecting positive and continuing efforts to recruit, employ and promote qualified women and minorities. When evaluating EEO performance, the Commission focuses on the licensee's efforts to recruit, employ and promote qualified women and minorities and the licensee's ongoing assessment of its EEO efforts. Such an assessment enables the licensee to take corrective action if qualified women and minorities are not present in the applicant pool. The Commission also focuses on any evidence of discrimination by the licensee. *See* Sections 73.2080(b) and (c) of the Commission's Rules, 47 C.F.R Sections 73.2080(b), 73.2080(c).

19. When an application indicates an absence of discrimination and a record of adequate EEO efforts, the application is granted, if otherwise appropriate. When it fails to evidence a record of adequate EEO efforts, the Commission may impose a variety of remedies or sanctions, such as reporting conditions, renewal for less than a full term, forfeiture, or a combination thereof. Further, the Commission will designate the application for hearing if the facts so warrant. *Amendment of Part 73 of the Commission's Rules Concerning Equal Employment Opportunity in the Broadcast Radio and Television Services*, 2 FCC Rcd 3967 (1987), *petition for reconsideration pending; see also* 4 FCC Rcd 1715 (1989) (request for clarification by National Association of Broadcasters). *See e.g., Beaumont, supra; Bilingual, supra.*

WRTH/WIL-FM, St. Louis, Missouri

20. The stations' opposition and inquiry response reveal that there were five full-time vacancies, including three for upper-level positions from February 1, 1990, to June 1, 1992. Recruitment sources were contacted for the five positions and minorities were received as follows: the *St. Louis American* (six), the St. Louis Urban League (one), employees (one), on-file resumes (three), the *St. Louis Post Dispatch* (0), the *St. Louis Argus* (0), the Greater St. Louis Black Media Coalition (0), the St. Louis Radio Association (0), other Heritage stations (0), Eastman Radio (0), Banner Radio (0), the Missouri State Employment Commission (0), the Human Development Corp. of St. Louis (0), Webster University, (0) and the University of Missouri (0). Minority sources were contacted for four of the five vacancies. The licensee received 11 Blacks for four vacancies overall, among 107 total applicants and seven Blacks for two upper-level positions among 71 total applicants. The 11 Blacks were among 71 applicants interviewed for full-time positions overall, while the seven Blacks were among 47 applicants interviewed for upper-level positions. One minority was hired for an upper-level position.[10]

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[7] We remind the NAACP that our primary focus, in reviewing EEO compliance, is on the licensee's EEO efforts. *See Amendment of Part 73 of the Commission's Rules Concerning Equal Employment Opportunity in the Broadcast Radio and Television Services*, 2 FCC Rcd 3967 (1987), (*Broadcast EEO), petition for reconsideration pending; see also* 4 FCC Rcd 1715 (1989) (request for clarification by National Association of Broadcasters).

[8] The Milwaukee, Wisconsin MSA, in which the stations are located, has a 11.1% minority labor force (8.2% Black, 2.0% Hispanic, 0.5% Asian/Pacific Islander, 0.4% American Indian). The 1990 Annual Employment Report lists one Black (3.6%) and one Hispanic (3.6%) among 28 full-time employees overall and one Black (4.2%) and one Hispanic (4.2%) among 24 upper-level job employees. In the 1991 report, one Black (3.9%) and one Hispanic (3.9%) are listed among 26 full-time employees, including one Black (4.3%) and one Hispanic (4.3%) among 23 upper-level job employees. The 1992 report lists one Black (3.7%) and one Hispanic (3.7%) among 27 full-time employees overall, including one Black (4.2%) and one Hispanic (4.2%) among 24 upper-level job employees.

[9] As is our practice in all cases, we reviewed the licensees' EEO efforts toward both women and minorities. We find each licensee's record of recruiting women sufficient.

[10] The St. Louis, Missouri MSA, in which the stations are located, has a 15.6% minority labor force (14.1% Black, 0.8% Hispanic, 0.5% Asian/Pacific Islander, 0.2% American Indian). The 1990 Annual Employment Report lists three Blacks (10.0%) among 30 full-time employees overall, including two Blacks (8.0%) among 25 upper-level job employees. In the 1991 report, one Black (3.3%) is listed among 30 full-time employees overall, including one Black (4.0%) among 25 upper-level job

21. The NAACP argues that the stations are operating far below the Commission's processing guidelines and that the stations' minority employment has declined from five to two since Heritage assumed control. In addition, it notes that the stations have only partially complied with their promises to contact certain organizations listed in their last renewal applications.

22. In opposition, the licensee states that stations WRTH/WIL-FM have a good EEO track record, but acknowledges that the departure of two minority employees in 1991 caused minority employment at the stations to decline below our processing guidelines. Nonetheless, it notes that, as a result of its continuing efforts, it subsequently hired a minority for an upper-level position.

23. There are no substantial and material questions of fact warranting designation for hearing. The licensee recruited, hired and employed minorities. *Astroline, supra.* Contrary to the NAACP's assertions, this case is not similar to *Rust Communications Group, Inc.*, 53 FCC 2d 355 (1975). In that case, the Commission designated a renewal application for hearing because the licensee allegedly made discriminatory remarks to one minority applicant, and allegedly refused to act on the application of another minority candidate. Here, there is no evidence that the licensee engaged in any such overt discrimination. The stations contacted outside recruitment sources for five full-time vacancies, including minority sources for four vacancies; received and interviewed 11 Black applicants; and hired a minority for an upper-level position. Accordingly, a forfeiture is unwarranted in this case. In addition, because the licensee maintained adequate records for meaningful self-assessment, reporting conditions and an admonition are unwarranted. We do, however, remind the licensee to contact sources likely to refer minorities for every vacancy. Accordingly, we find that unconditional grant of the stations' transfer of control applications does serve the public interest.

WBBF/WBEE-FM Rochester, New York

24. The stations' opposition and inquiry responses reveal that there were eight full-time vacancies, including five for upper-level positions from June 1, 1991, to June 1, 1992. Recruitment sources were contacted for seven vacancies and minority applicants were received as follows: trade ads (two), employees (one), Heritage Station Listing Guide (one), referral from a local broadcaster (one), Gannett ad (one), National Council for Negro Women (one), newspapers (one), walk-ins (one), managers at other broadcast stations, Talent Masters, and various sources such as community organizations, educational institutions, minority organizations,[11] and female organizations. Syracuse University was the only outside source contacted for the remaining vacancy. The licensee received 12 minorities (eight Blacks and four Hispanics), among 66 applicants,[12] for six vacancies, including seven minorities, (three Blacks and four Hispanics) among 40 applicants for three upper-level vacancies. Seven minorities, all Blacks, among 61 applicants were interviewed for five vacancies while two Blacks among 35 applicants were interviewed for two upper-level positions. No minorities were hired for any of the eight vacancies.[13]

25. The NAACP contends that the stations are operating well below our guidelines and that the number of minority employees has declined since the licensee assumed control. Further, it contends that the licensee is not contacting recruitment sources.

26. In opposition, the licensee states that although these stations have experienced minor fluctuations in minority employment, their employment of minorities is near 50% of parity. Further, the stations are actively seeking to increase the number of minority employees.

27. There are no substantial and material questions of fact warranting designation for hearing. *Astroline, supra.* The licensee employed minorities and attracted several minority applicants for job vacancies. Although the licensee noted that five minorities were not interviewed for lack of prior experience, it did interview seven other minorities. Moreover, we note that the five minorities were among a total of 231 applicants who were not interviewed. Based on this record, we find no evidence of employment discrimination. In addition, we find that the licensee generally complied with our EEO Rule. The licensee contacted recruitment sources, including minority organizations, for most vacancies and attracted and interviewed minority applicants. Accordingly, a forfeiture is unwarranted in this case. In addition, because the stations maintained adequate records and engaged in some self-assessment, reporting conditions are unwarranted.

28. However, we are concerned that the stations interviewed only two minority applicants for upper-level positions. Accordingly, we admonish the licensee to contact minority sources and other sources likely to refer qualified minority applicants for every vacancy and to review, more carefully, their methods of contacting recruitment sources, particularly for upper-level vacancies.

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employees. The 1992 report lists two Blacks (6.5%) among 31 full-time employees overall, including two Blacks (7.7%) among 26 upper-level job employees.

In response to our inquiry, the licensee provided termination information from March 1, 1990, to June 1, 1992. This information revealed that the licensee's decline in minority employment in 1991 was due to the departures of two Black employees for other positions. The minorities were among six full-time employees who departed the stations during the period March 1, 1990, to June 1, 1992. The NAACP has not presented any evidence that the licensee engaged in discriminatory practices in its terminations.

[11] Minority sources which appeared on these lists include: Spanish Action Coalition, Rochester Black Media Coalition, Rochester Association of Black Communicators, Puerto Rican Arts & Cultural Center, National Black Media Coalition, National Council of Negro Women, Urban League of Rochester, Puerto Rican Youth Development & Resource Center, National Association of Negro Business & Professional Women's Club Inc., *Spanish Magazine*, La Voz Latina, and NAACP.

[12] The licensee had a total of 297 applicants. However, it could identify the race of only 66.

[13] The Rochester, New York MSA, in which the stations are located, has a 9.2% minority labor force (6.8% Black, 1.5% Hispanic, 0.6% Asian/Pacific Islander, 0.3% American Indian). The 1992 Annual Employment Report lists one Black among 28 full-time employees overall (3.6%) and 24 upper-level job employees (4.2%).

WEAR-TV, Pensacola

29. The station's 1990 EEO Program Report, opposition and inquiry response reveal that the licensee filled 59 full-time vacancies, including 49 for upper-level positions during the period September 27, 1988, to December 31, 1991. Contacts with recruitment sources and minority referrals were as follows: *Medialine* (10), *Pensacola News Journal* (seven), Pensacola Private Industry Council (four), Pensacola Human Relations Commission (four), RTNDA (four), employees (four), *Electronic Media* (two), NAB (two), *New American Press* (two), *Broadcasting Magazine* (five), Catholic Social Service (two), other stations (one), *Pensacola Voice* (one), Job Service of Florida (one), *Broadcasting Magazine* or *Medialine* (five), on-file resumes (two), call-ins (one), walk-ins (one), NAACP, Mobile Chapter (0), ABC Marketing Advisory Board (0), *Mobile Press Register* (0), employment agencies (0), Pensacola Jr. College (0), University of West Florida (0) advertising agencies (0), *Classified Communications* (0), Department of Labor (0), University of South Alabama (0), University of Florida (0), and JobLine (0). The licensee contacted at least one source likely to refer minority applicants for 42 vacancies.[14] The licensee could document 71 minority applicants (67 Blacks, two Asians, one Hispanic, and one American Indian) for 30 full-time vacancies overall and 54 minority applicants (52 Blacks, one Hispanic, and one American Indian) for 22 upper-level positions. [15] Thirty-nine minorities (36 Blacks, two Asians, and one American Indian) were interviewed for 21 vacancies among 286 applicants and 23 minorities (22 Blacks and one American Indian) were interviewed for 13 upper-level positions among 213 upper-level job applicants.[16] The licensee hired seven minorities (four Blacks, two Asians and one American Indian), including four minorities (three Blacks and one American Indian) for upper-level positions.[17]

30. The NAACP contends that the station has never operated above our processing guidelines since the licensee assumed control. Moreover, it criticizes the licensee's employment of two minority employees as service workers and its hiring of only one minority for 14 upper-level positions during the 12 months prior to filing the renewal application. In addition, citing *Applications For Renewal of License of Certain Broadcast Stations Serving Communities in the State of South Carolina,* 5 FCC Rcd 1704, 1710 n.8 (1990), the NAACP criticizes the licensee's failure to add more minority sources to its recruitment list despite an apparent inability to attract a sufficient pool of minority applicants.

31. In opposition, the licensee states that it has pursued a serious and successful EEO program and that its minority employment profile meets or surpasses our EEO processing guidelines. Moreover, it notes that during the last three years, it significantly increased the percentage of minority employees in its work force. The licensee also notes that it has assessed and modified its program as evidenced by a comparison of its 1987 and 1992 EEO Program Reports which shows that it has added significantly to its referral sources. It also notes that, during the 12 months prior to filing the renewal application, it contacted minority and female organizations which were not listed in earlier EEO programs. The licensee notes that its rate of hiring minorities is rising and that all of the minorities hired during the subject period were hired for upper-level positions.[18]

32. There are no substantial and material questions of fact warranting designation for hearing. *Astroline, supra.* We find no evidence of employment discrimination. The licensee contacted sources likely to refer minorities for most vacancies, received minority referrals, attracted 71 minorities, interviewed 39 minority applicants, and hired minorities for seven vacancies, including four for upper-level positions. Accordingly, a forfeiture is unwarranted in this case. In addition, because the licensee maintained adequate records and engaged in some self-assessment, reporting conditions are unwarranted.

33. However, we are concerned that the licensee did not use all of its sources, which proved productive in referring minority applicants, for every vacancy.[19] Accordingly, we admonish the licensee to contact all of its generally productive recruitment sources for every vacancy as it occurs.

KULL/KRPM-FM, Seattle and Tacoma, Washington

34. The stations' opposition and inquiry responses reveal that the licensee had nine full-time vacancies, including eight for upper-level positions from February 1, 1991, to June 1, 1992. Minority referrals were received by *Radio & Records* (one) and, presumably, employees (one). The licensee recruited for seven positions. It contacted *Radio & Records* and Puget Sound Radio Broadcast Association (PSRBA) for one vacancy; *Seattle Times,* PSRBA and other stations for one vacancy; National Broadcasting School for one vacancy; PSRBA and *Seattle Times* for one vacancy; *Seattle Times,* PSRBA and National Broadcasting School for one vacancy; other stations for one vacancy; and Metro Traffic for one vacancy. For the remaining two vacancies, the licensee contacted no referral sources. General letters requesting minority referrals were sent quarterly to five additional educational institutions, six minority organiza-

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[14] This number includes those positions for which the licensee contacted minority sources and/or general sources which generally proved productive.

[15] The licensee attracted a total of 1,700 applicants for 59 full-time vacancies. However, it could ascertain the race of only 783 of these applicants.

[16] The licensee interviewed a total of 324 applicants but could not ascertain the race of 38 applicants who were interviewed by telephone.

[17] The Pensacola, FL MSA, in which the station is located, has a 17.5% minority labor force (14.3% Black, 1.3% Hispanic, 0.8% Asian/Pacific Islander, 1.1% American Indian). In the 1988 report, four Blacks (6.8%) are listed among 59 full-time employees overall, including two Blacks (4.0%) among 50 upper-level job employees. The 1989 and 1990 reports list seven Blacks among 71 (9.9%) and 76 (9.2%) full-time employees overall, respectively, including five Blacks among 62 (8.1%) and 67 (7.5%) upper-level job employees, respectively. In the 1991 report, eight Blacks (10.1%) are listed among 79 full-time employees overall, including six Blacks (7.6%) among 70 upper-level job employees.

[18] The licensee bases this assessment on a period from September 27, 1988, to September 26, 1991.

[19] In this regard, we note that 62 minority applicants were received for 22 of the 30 positions for which the licensee used at least two of its generally productive outside recruitment sources. *See* para. 29, *supra.* However, only nine minority applicants were received for eight of the 29 vacancies for which no more than one generally productive source was used.

tions, six female organizations and three community organizations. Two minorities among 39 applicants were attracted and interviewed for two vacancies. The only minority hired was a Black male for an announcer position.[20]

35. NAACP notes that these stations are operating well below our processing guidelines and that the number of minority employees has declined from three to one since the licensee assumed control of the stations in September 1988. Further, NAACP contends that the licensee does not contact its minority recruitment sources.

36. The licensee acknowledges that it lost one minority since its last renewals were granted, which resulted in a decline of its minority employment in 1991 below our processing guidelines. However, it argues that to judge the stations' EEO compliance on only one year (1991) would be inappropriate and unreliable. It states that, based on the levels of minority employment during the previous years, it is clear that the stations' 1991 employment profile is an aberration and is not representative of the stations' overall hiring and employment practices. The licensee argues that it is engaged in serious efforts to recruit minorities in hopes of bringing its minority employment back up to its previous level and beyond.[21]

37. In its Comments, NAACP notes that the licensee contacted minority organizations for none of the vacancies filled during the period under review, but instead contacted these sources only quarterly and without regard to specific vacancies. The licensee's efforts for specific vacancies consisted of contacting general sources or no sources. In addition, NAACP notes that the number of minority applicants and hires falls short of the 10.5% minority labor force and that this record constitutes deliberate discrimination.

38. Upon analysis of the licensee's EEO record, we find no substantial and material questions of fact warranting designation for hearing. *Astroline, supra.* The licensee recruited, hired and employed minorities, and we find no evidence of employment discrimination. However, the licensee did not engage in adequate efforts to attract minorities. The licensee failed to contact minority sources or other sources likely to refer a pool of minority applicants for its nine vacancies. Instead, it contacted only general sources for seven vacancies and no sources for two vacancies. As a result, the licensee attracted only two minority applicants for only two positions.

39. Upon review of the record, we find that grant of the transfer of control applications is justified. However, for violations of our EEO Rule as reflected above, by this *Order,* we issue a Notice of Apparent Liability for $6,250 and impose reporting conditions.[22]

V. CONCLUSION

40. After reviewing the record in the instant case, we find no hearings are warranted. Contrary to the NAACP's assertions, this case is not similar to *Beaumont, supra,* or *Leflore Broadcasting Company, Inc.,* 36 FCC 2d 101 (1972). In *Beaumont,* the court ordered a hearing in light of the unexplained departures of seven Black employees, the licensee's inconsistent statements to the Commission regarding its employment practices and the licensee's failure to maintain an EEO program. In *Leflore, supra,* the Commission ordered the licensee to file early renewal applications because *inter alia,* the licensee inexplicably terminated Black employees subsequent to assuming control of the stations.

41. No evidence of such overt discrimination has been presented in this case. Here, there was no sudden departure of minority employees. Moreover, the stations, except KULL/KRPM-FM, maintained EEO programs which generally comply with our EEO Rule. The NAACP has not presented sufficient evidence that the licensee has made inconsistent statements regarding its employment practices. We find that the records of the licensees support the granting of the pending applications without conditions for all stations, except KULL/KRPM-FM. However, an admonition is warranted for Stations WBBF/WBEE-FM and WEAR-TV. A Notice of Apparent Liability for $6,250 and reporting conditions are warranted for Stations KULL/KRPM-FM. Because the NAACP has failed to show compelling reasons and to raise a substantial and material question of fact, we deny its request that we order the radio stations to file early renewal applications. *See Applications of WWOR-TV, Inc. For Transfer of Control of WWOR-TV, Inc., Licensee of Station WWOR-TV, Channel 9 Secaucus, New Jersey,* 6 FCC Rcd 6569, 6574 (1991); *Greater Portland Broadcasting Corp.,* 3 FCC Rcd 1953, 1954 (1988); *Sioux Empire Broadcasting Co.,* 9 FCC 2d 683, 684 (1967).

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[20] The stations are located in separate MSAs -- the AM station is located in Seattle, while the FM station is located in Tacoma, WA. Because the Tacoma MSA has the larger minority labor force, we will analyze both stations' employment profiles based on the Tacoma minority labor force. *See Applications for Renewal of License of Certain Broadcast Stations Serving the States of Michigan and Ohio,* 3 FCC Rcd 6944 (1988). The Tacoma, WA MSA has a 10.5% minority labor force (4.7% Black, 1.9% Hispanic, 3.0% Asian/Pacific Islander, 0.9% American Indian). The 1991 Annual Employment Report lists one Black (4.0%) among 25 full-time employees overall, including one Black (4.4%) among 23 upper-level job employees. In the 1992 report, one Black is listed among 29 full-time employees overall (3.5%) and 26 upper-level job employees (3.9%).

Our review raised concerns regarding the stations' minority employment after its previous license term expired. The amended 1990 report, which was the last report documenting minority employment during the previous license term, listed one Asian (4.0%) and one American Indian (4.0%) among 25 full-time employees overall and one Asian (4.5%) among 22 upper-level job employees. Neither employee appeared on the 1991 report. The licensee's inquiry response indicates that during the period March 2, 1990, to June 1, 1992, the licensee had 14 terminated full-time employees. The Asian employee left the stations for new employment while the American Indian resigned due to studio relocation.

[21] We remind the licensee that our processing guidelines are not a safe harbor. *See Catawba Valley Broadcasting Company, Inc.,* 3 FCC Rcd 1913 (1988).

[22] We intend that the reporting conditions will transfer with the license to the new licensee upon consummation of the transfer. *See Woolfson Broadcasting Corp.* 4 FCC Rcd 6160 (1989).

VI. ORDERING CLAUSES

42. Accordingly, IT IS ORDERED, that the petition to deny filed by NAACP against the applications filed by Heritage-Wisconsin Broadcasting Corp. for transfer of control of licenses for Stations WEMP/WMYX-FM from James M. Hoaks, Jr. to Shareholder of Heritage Media Corporation IS DISMISSED.

43. IT IS FURTHER ORDERED, that the petition to deny filed by NAACP against the applications filed by WIL Music, Inc., WBBF, Inc.; WEAR Ltd., and Heritage Media Services for transfer of control of licenses for Stations WRTH/WIL-FM, WBBF/WBEE-FM, WEAR-TV, and KULL/KRPM-FM from James M. Hoak, Jr. to Shareholders of Heritage Media Corporation IS DENIED.

44. IT IS FURTHER ORDERED, that the petition to deny filed by the Florida State Conference of Branches of the NAACP and the Pensacola Branch of the NAACP against the renewal applications filed by WEAR-Ltd. for Station WEAR-TV IS DENIED.

45. IT IS FURTHER ORDERED, that the applications for transfer of control of licenses filed by Heritage-Wisconsin Broadcasting, Corp. for Stations WEMP/WMYX-FM, WIL Music, Inc. for Stations WRTH/WIL-FM, WBBF, Inc. for Stations WBBF/WBEE-FM, and WEAR Ltd. for Station WEAR-TV ARE GRANTED.

46. IT IS FURTHER ORDERED, that the application for renewal of license filed by WEAR Ltd. for Station WEAR-TV IS GRANTED.

47. IT IS FURTHER ORDERED, that the applications for transfer of control filed by Heritage Media Services for Stations KULL/KRPM-FM ARE GRANTED subject to the reporting conditions described herein and, pursuant to Section 503 of the Communications Act of 1934, as amended, 47 U.S.C. Section 503, a NOTICE OF APPARENT LIABILITY FOR FORFEITURE in the amount of $6,250.

48. IT IS FURTHER ORDERED, that the licensee of Stations KULL/KRPM-FM submit to the Commission an original and one copy of the following information on January 1, 1994, January 1, 1995, and January 1, 1996:

a. For each report, please make two lists divided by full-time and part-time job vacancies during the twelve months preceding the respective reporting dates, indicating the job title and FCC job category, date of hire, the race or national origin, sex and the referral source of each applicant for each job and the race of national origin and sex of the person hired. This list should also note which recruitment sources were contacted;[23]

b. A list of employees as of the December 1st payroll period for each annual report by job title, indicating full-time or part-time status (ranked from highest paid classification), date of hire, sex, and race or national origin; and

c. Details concerning the station's efforts to recruit minorities for each position filled during the 12-month periods specified, including identification of sources used and indicating whether any of the applicants declined actual offers of employment. In addition, the licensee may submit any information it believes relevant regarding the station's EEO performance and its efforts thereunder.

49. The reports are to be filed with the Secretary of the Commission for the attention of the Mass Media Bureau's EEO Branch. Should the parties have any questions regarding this action, they may telephone the Mass Media Bureau's EEO Branch at 202-632-7069. Regarding the forfeiture proceedings the licensee may take any of the actions set forth in Section 1.80 of the Commission's Rules, as summarized in the attachment to this Memorandum Opinion & Order and Notice of Apparent Liability. Any comments relating to the ability to pay should include those financial letters set forth in the noted attachment.

50. IT IS FURTHER ORDERED, that the Mass Media Bureau send by Certified Mail – Return Receipt Requested – one copy of this Memorandum Opinion and Order and Notice of Apparent Liability to all parties.

FEDERAL COMMUNICATIONS COMMISSION

William F. Caton
Acting Secretary

STATEMENT OF COMMISSIONER ANDREW C. BARRETT CONCURRING IN PART/DISSENTING IN PART

In re: Heritage Media Corporation [WEAR-TV, Pensacola, Florida, License Renewal and Transfer of Control Application; KULL/KRPM-FM, Seattle and Tacoma, Washington, Transfer of Control Applications]

This *Memorandum Opinion and Order and Notice of Apparent Liability* (MO&O) grants the transfer of control applications for Heritage Media Corporations' broadcast stations as well as the renewal application for WEAR(TV). Heritage Media Corporation has been accused of presiding over declining minority employment and languishing EEO programs since it assumed control of its conglomerate of broadcast stations. However, only KULL/KRPM-FM have seriously violated the Commission's EEO rules and policies.

I concur in this Order to the unconditional grant of the transfer of control applications, as well as admonitions when warranted, for Heritage's broadcast stations, not including KULL/KRPM-FM. These stations have generally

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[23] Such a list might start:

(1) News Director; Officials and Managers; Full-time

3 Applicants:	1 White female	AWRT
	1 Black male	Urban League
	1 Black female	NAACP

Sources contacted: Local newspaper, AWRT, Urban League and NAACP.

Selected: Black male (03/15/93).

made affirmative efforts to recruit, interview, and employ minorities as well as maintain adequate records and engage in meaningful self-assessment. Those stations that need to improve their recruitment efforts in any way will receive an admonition from the Commission.

I dissent in this Order because of the insufficient sanctions imposed upon KULL/KRPM-FM, which are prime examples of stations with deficient EEO programs. KULL/KRPM-FM failed to adequately recruit minorities as well as failed to contact any minority sources for any vacancies. According to the Order, KULL/KRPM-FM will receive a forfeiture of $6250, which is too low relative to the extent of EEO violations. Consistent with my prior statements, due to the manner in which minorities were excluded from the hiring pools for a vast majority of the positions, harsher sanctions are warranted.[1]

The Commission must continue to fulfill its obligation to aggressively enforce EEO rules and policies. Otherwise, the American public will greatly suffer from a lack of diversity in the broadcast industry.

[1] *See,* Concurring and Dissenting Statement of Commissioner Andrew C. Barrett, RE: KOY/KOY-FM, Phoenix, Arizona, License Renewal, July 2, 1993.

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of the Application of

IDB Mobile Communications, Inc. — File No. I-T-C-93-188

For authority Pursuant to Section 214 of the Communications Act of 1934, as amended, to provide Inmarsat Standard B and Standard M Mobile Satellite Services in the Atlantic, Pacific and Indian Ocean Regions

MEMORANDUM, OPINION, ORDER AND AUTHORIZATION

Adopted: August 9, 1993; Released: August 20, 1993

By the Chief, International Facilities Division:

1. On May 11, 1993, IDB Mobile Communications, Inc. (IDB) filed an application pursuant to Section 214 of the Communications Act of 1934, as amended, for authority to provide Inmarsat Standard B and Standard M mobile satellite services in the Atlantic Ocean Region (AOR), Pacific Ocean Region (POR) and Indian Ocean Region (IOR). The application was placed on public notice on May 19, 1993, and no oppositions were received. On June 18, 1993, Comsat filed a letter regarding the application, and on June 30, 1993, IDB responded.

2. IDB requests authority to provide service in the ship to shore direction only in the AOR-East and AOR-West via the Laurentides, Quebec, Canada foreign land earth station (LES) and in the POR via LES facilities at Hong Kong. IDB states that it will construct its own U.S. based Inmarsat Standard B and Standard M facilities for this traffic as soon as there is adequate justification for the cost of modifying its existing U.S. based Inmarsat LESs.[1] IDB requests authority to provide service in the ship to shore and shore to ship directions in the IOR via the Hong Kong foreign LES. It states that it cannot provide IOR service from U.S. based facilities because the footprint of Inmarsat's IOR satellite does not cover the United States.[2]

3. IDB seeks to offer Inmarsat Standard B and Standard M for MMSS and international LMSS.[3] The application informs us that all service will be provided via Inmarsat first and second generation satellites. IDB states that accounting will be performed in accordance with generally accepted accounting principles. Charges and regulations governing the service will be specified in one or more tariffs which IDB will file with the Commission to the extent required by law.

4. According to IDB, grant of this application will serve the public interest because Inmarsat Standard B and Standard M services are of enormous benefit to IDB's potential customers. Authorization of IDB to provide Inmarsat Standard B and Standard M service in the AOR, POR, and IOR will enable IDB to offer these services globally, which is vital for IDB as a U.S. carrier to compete effectively with foreign signatories offering global coverage.

5. Although §§ 751 *et seq.* of the Inmarsat Act may bar the use of foreign LESs to carry U.S. originated shore to ship traffic without Comsat's provision of the Inmarsat space segment, Comsat in its letter states it does not oppose the grant of this application as long as it does not establish any precedent. In response, IDB agrees to inclusion of a proviso that the a grant of the instant application would be limited to the facts of this case. We note that IDB's proposed services in the AOR and POR are limited to ship to shore communications and that no oppositions have been received. Furthermore, in the circumstances present here, we note that it is necessary for IDB to use a foreign LES in order to provide ship to shore and shore to ship Inmarsat Standard B and Standard M services in the IOR. Without this arrangement in this case, service would not be possible.[4] Therefore, we find the circumstances of this request for shore to ship traffic in the IOR to be unique, and limit our findings to the specific facts of this case.

6. Based on the foregoing, we conclude that it will be in the public interest to grant IDB authority for the provision of ship to shore Inmarsat Standard B and Standard M MMSS and international LMSS in the AOR, POR and IOR, and shore to ship Inmarsat Standard B and Standard M MMSS and international LMSS in the IOR subject to the conditions set forth herein.

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[1] Although IDB continues to own these earth stations, control and authorization for their operation have been transferred to Southwest Communications, Inc. (SCI). *See* CICI, Inc., File Nos. CSG-92-042-(8)-AL, CSG-92-043-(21)-AL, EID-680, 7 FCC Rcd 6031 (1992).

[2] IDB currently has authority to provide maritime mobile satellite service (MMSS), international aeronautical mobile satellite service (AMSS) and international land mobile satellite service (LMSS) via the Inmarsat system in the AOR and POR via SCI's LES facilities and MMSS and LMSS in the IOR via LES facilities in Perth, Australia. It also has been granted authority to provide Inmarsat Standard C MMSS, AMSS, and LMSS in the ship to shore direction only in the AOR-West via Comsat's earth station at Southbury, Connecticut, in the AOR-East via the Burum, the Netherlands LES, in the POR via Perth, and in both direction in the IOR via Perth. *See* IDB Aeronautical Communications, Inc., File No. I-T-C-90-088, 6 FCC Rcd 2485 (1991); IDB Aeronautical Communications, Inc., File No. I-T-C-91-012, 6 FCC Rcd 5962 (1991); IDB Aeronautical Communications, Inc., File Nos. I-T-C-93-013-014, 8 FCC Rcd 807 (1993); IDB Aeronautical Communications, Inc., File Nos. I-T-C-92-058-059, I-T-C-93-013-014, 8 FCC Rcd 930 (1993).

[3] IDB's international LMSS services include (1) communications within and between foreign countries, excluding North America, and (2) communications between North America and mobile satellite terminals located outside North America. IDB does not seek authorization to provide LMSS to or from mobile satellite terminals located in North America, defined as the United States, Canada and Mexico. IDB seeks to offer service both to mobile satellite terminals and to temporary fixed satellite terminals.

[4] The only authorized Comsat LES facility that is capable of serving the IOR is a Standard A LES near Ankara, Turkiye. *See* Communications Satellite Corporation, File No. I-T-C-91-228, 7 FCC Rcd 2218 (1992). That facility does not provide Standard B or Standard M service.

7. Accordingly, IT IS ORDERED, pursuant to Section 214 of the Communications Act of 1934, as amended, 47 U.S.C. § 214, that the application of IDB Mobile Communications, Inc., File No. I-T-C-93-188, IS GRANTED and IDB is authorized to:

A. provide Inmarsat Standard B and Standard M mobile satellite service in the ship to shore direction only in the AOR-East and AOR-West via the Laurentides, Quebec, Canada foreign LES and in the POR via LES facilities at Hong Kong;

B. provide Inmarsat Standard B and Standard M mobile satellite service in the ship to shore and shore to ship directions in the IOR via the Hong Kong foreign LES; and

C. offer Inmarsat Standard B and Standard M mobile satellite service for the following applications: maritime mobile satellite service, international land mobile satellite service, and international land based temporary fixed satellite services. IDB's provision of international land mobile satellite service and land based temporary fixed satellite services will be limited to (i) communications within and between foreign countries, excluding North America,[5] and (ii) communications via the Laurentides, Quebec, Canada LES and via the Hong Kong LES between fixed points in North America and mobile satellite terminals located outside North America. IDB may not provide international LMSS to or from mobile satellite terminals located in North America, defined as the land area of the United States, Canada and Mexico. The United States includes Alaska, Hawaii, Puerto Rico, and the U.S. Virgin Islands.

8. IT IS FURTHER ORDERED that IDB shall not provide any Inmarsat Standard B or Standard M service from the United States to points in the AOR or POR under this authorization.

9. IT IS FURTHER ORDERED that IDB is authorized to provide international LMSS and land based temporary fixed satellite services only within the frequency bands specified below which are consistent with the U.S. allocation for maritime services. Thus, IDB shall serve only those land mobile satellite and land based temporary fixed satellite terminals communicating in the transmit frequency band 1626.5-1645.5 MHz and the receive frequency band 1530-1544 MHz for the mobile-to-satellite and satellite-to-mobile links of its international land mobile satellite services. In addition, users of this service shall obtain the appropriate license or other authorization from the local telecommunications authority of the country in which the terminal will be used and any necessary licenses or authorizations from Agencies or Departments of the United States government (such as Treasury or Commerce). Thus, this authorization shall not be construed as providing domestic uplink or downlink authority within countries outside of the United States.

10. IT IS FURTHER ORDERED that this authority does not cover the provision of international land mobile satellite services or land based temporary fixed satellite services via any new land earth stations or Inmarsat satellites or cover any land mobile satellite services not specifically authorized herein.

11. IT IS FURTHER ORDERED that this authorization is conditioned upon completion of the consultation(s) required by Article XIV(d) of the Intelsat Agreement to ensure technical compatibility and to avoid significant economic harm. In addition, IDB shall maintain as its first priority the service of maritime commercial, safety and distress needs, and in particular uphold the safety and distress requirements of the Global Maritime Distress and Safety System.

12. IT IS FURTHER ORDERED that IDB shall file with the Commission every six months a letter reporting Inmarsat's progress in developing a means of distinguishing between maritime, aeronautical, and land mobile satellite transmissions to allow for the primacy of maritime services and compliance with Commission Regulations and Rules regarding the use of these bands.

13. IDB shall terminate the use of LES facilities outside the United States to provide Inmarsat Standard B and Standard M service in the AOR and POR as soon as there is adequate economic justification for the cost of modifying SCI's existing Inmarsat LESs in the U.S.

14. The Commission retains jurisdiction over this matter to ensure the nondiscriminatory use of, and equitable access to, the Inmarsat satellite system.

15. IT IS FURTHER ORDERED that IDB will be classified as dominant in the provision of the services authorized herein.

16. IT IS FURTHER ORDERED, pursuant to Section 203 of the Communications Act, 47 U.S.C. § 203, and Part 61 of the Commission's Rules, 47 C.F.R. Part 61, that IDB shall file and have in effect a tariff for the services authorized in this order before offering services to the public.

17. IT IS FURTHER ORDERED that IDB shall file copies of any operating agreements entered into by itself or its parent/affiliates with its correspondents within 30 days of their execution, and shall otherwise comply with the filing requirements contained in Section 43.51 of the Commission's Rules, 47 C.F.R. § 43.51.

18. IT IS FURTHER ORDERED that IDB shall file quarterly reports of revenue, number of messages, and number of minutes of both originating and terminating traffic for all international services between the U.S. and all international points it is authorized to serve within 90 days from the end of each calendar quarter.

19. This order is issued under Section 0.291 of the Commission's Rules and is effective upon adoption. Petitions for reconsideration under Section 1.106 or applications for review under Section 1.115 of the Commission's Rules may be filed within 30 days of public notice of this order (*see* Section 1.4(b)(2)).

[5] Service also shall be excluded to countries for which the United States has an embargo on telecommunications.

FEDERAL COMMUNICATIONS COMMISSION

George S. Li
Chief, International Facilities Division
Common Carrier Bureau

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of:

Amateur Radio Station WA4D
Michael E. Whatley
5844 Doris Drive
Alexandria, VA 22311

NAL/Acct. No.: 315HF0001

Liability for Forfeiture

FORFEITURE ORDER

Adopted: August 13, 1993; Released: August 20, 1993

By the Field Operations Bureau:

I. INTRODUCTION

1. This Notice of Monetary Forfeiture is issued pursuant to Section 503(b) of the Communications Act of 1934, as amended, 47 U.S.C.§ 503(b), to Michael E. Whatley (Whatley) for willfully and maliciously causing interference to other amateur operations in the amateur radio service in violation of Section 97.101(d) of the Commission's Rules, 47 C.F.R. § 97.101(d), and Section 333 of the Act, 47 U.S.C. § 333.

2. The appropriate amount of forfeiture for this violation is $2,000. No further adjustments appear warranted.

II. BACKGROUND

3. On November 3, 1992, the Field Operations Bureau (FOB) issued a Notice of Apparent Liability (NAL) to Mr. Whatley for violating Commission Rules which prohibit deliberately interfering with the communications or transmission of other stations. The Commission provided Whatley with an opportunity to respond to allegations that he deliberately interfered with amateur radio service communications on 7257 kHz and 7258 kHz.

4. In December 1992 Whatley called and wrote to the FOB requesting copies of recordings of the violative transmissions, and requesting a thirty (30) day extension of time in which to respond. The FOB granted Whatley an extension of time in which to file a response, and provided both tapes and a transcript of the tapes. Mr. Whatley is now requesting that the Bureau reconsider its decision to issue the NAL.

III. DISCUSSION

5. Mr. Whatley's Petition for Reconsideration challenges the Bureau's finding that he willfully interfered with other amateur transmissions. He argues that other amateur operators were interfering with his transmissions. As evidence of this, he cites the fact that operators who were communicating as part of a net moved over by only 1 kHz, rather than the more acceptable 3 kHz of standard separation when moving from one transmitting frequency to another one. Mr. Whatley also contends that the transcripts are incomplete in that they do not reflect all communications which were recorded on tape.[1] Specifically, Mr. Whatley cites to a complaint of interference made by other amateurs operating on 7255 kHz when the net that was operating on 7258 kHz moved to 7257 kHz.

6. We have reviewed the record and affirm our initial findings. When the net which was operating on 7258 kHz moved to 7257 kHz to avoid interference from Mr. Whatley's communications, this was done to minimize and avoid interference from Mr. Whatley's communications. Critical to our finding of deliberate or willful interference&is the fact that Mr. Whatley followed the net and continued to interfere with their communications. Any interference caused by the net to communications which were on 7255 kHz was clearly a result of the net moving to avoid interference from Mr. Whatley rather than willful interference. Mr. Whatley, therefore, should not rely on these interference complaints to excuse his own actions. Mr. Whatley also contends that the parties to the communications ignored his attempt to "compromise". We are not persuaded by this argument. Further, Mr. Whatley's actions and communications indicate hostility towards the net members that were communicating, and do not support his claim that he intended to be conciliatory.

7. For the above reasons, we affirm our finding of liability for monetary forfeiture. According to forfeiture guidelines set out in the Commission's *Policy Statement, Standards for Assessing Forfeitures*, 6 FCC Rcd 4695 (1991), *modified in part on reconsideration*, 7 FCC Rcd 5339 (1992), *petition for review pending sub nom. USTA v. FCC*, No. 92-1321 (D.C. Cir. filed July 30, 1992) (*Policy Statement)*, and Section 503(b)(2) of the Act, 47 U.S.C. § 503(b)(2), the base forfeiture amount for malicious interference in violation of Section 503 is $7,000. This amount was reduced to $2,000 because Mr. Whatley is an individual and had no record of prior violations.

IV. CONCLUSION

8. Michael E. Whatley has violated Section 333 of the Act, and Section 97.101(d) of the Commission's Rules. In accord with the *Policy Statement*, we are issuing this monetary forfeiture for $2,000. No further adjustments appear warranted.

V. ORDERING CLAUSES

9. Accordingly, IT IS ORDERED, pursuant to Section 503(b) of the Communications Act, and Section 1.80(f) of the Rules, 47 C.F.R. § 1.80(f), that Michael E. Whatley FORFEIT to the United States the sum of Two Thousand

[1] Our findings were based on the whole record, which includes the transcript as well as the tape. We note that Mr. Whatley was provided with a copy of the tape.

Dollars ($2,000) for maliciously interfering with amateur radio service communications in violation of Section 6333 of the Communications Act, 47 U.S.C. § 333, and Section 97.101(d) of the Commission's Rules, 47 C.F.R. § 97.101(d).

10. Payment must be made within thirty (30) days of receipt of this Order. Payment should be made by check or money order, marked with the NAL number (315HF0001), payable to the Federal Communications Commission, and must be mailed to:

Federal Communications Commission

Post Office Box

Chicago, Illinois 60673-7482

11. IT IS FURTHER ORDERED that a copy of this Notice of Monetary Forfeiture shall be sent by certified mail to Michael E. Whatley, 5844 Doris Drive, Alexandria, VA 22311.

FEDERAL COMMUNICATIONS COMMISSION

Mary Beth Richards
Chief, Enforcement Division

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of the Application of

COMSAT GENERAL CORPORATION — File No. 42-DSS-ML-93, 43-DSS-MISC-93

Application for interim orbital assignment of the SBS-3 domestic satellite to 72° W.L. and request for authority to offer up to nine SBS-3 transponders on a non-common carrier basis

MEMORANDUM OPINION AND ORDER

Adopted: August 9, 1993; Released: August 20, 1993

By the Chief, Domestic Facilities Division:

I. INTRODUCTION

1. Comsat General Corporation (Comsat General) has filed an application[1] requesting authority to relocate its SBS-3 Ku-band satellite from 95° W.L. to 72° W.L. on an interim basis.[2] Comsat General also requests authority to offer up to nine of SBS-3's transponders on a non-common carrier basis. No petitions or comments were received on Comsat General's application. For the reasons discussed below, we grant Comsat General's application.

II. DISCUSSION

2. By the terms of the *Hughes Recon. Order*, Hughes has authority to temporarily operate SBS-6 from 95° W.L. until December 31, 1995 at which time Galaxy 3H will be launched into its regularly assigned 95° W.L. location. Because SBS-6 does not have to occupy 72° W.L. until the end of 1995, granting Comsat General's request will allow space segment capacity to operate from 72° W.L. over two years earlier than it might otherwise. Therefore, we will grant Comsat General authority to relocate its SBS-3 satellite to 72° W.L. until December 31, 1995.

3. With respect to its transponder sales request, Comsat General states that its SBS-3 is equipped with ten transponders, of which nine are fully functional. Comsat General asserts that grant of this request will allow it to more effectively compete with other domestic satellite licensees that have authority to offer satellite capacity on a non-common carrier basis. Comsat General asserts that in practice, the ability to offer non-common carrier domestic fixed satellite capacity has afforded users of domestic-fixed satellite capacity the opportunity to negotiate extensively with many suppliers of satellite capacity and to obtain the desired mix of terms and conditions tailored most appropriately and uniquely to serve that particular user's needs. We agree.

4. Based on Comsat General's representations, we find that its proposed transponder transactions are noncommon carrier in nature and that the removal of up to nine transponders on SBS-3 from common carrier service will not adversely affect the availability of common carrier satellite capacity. Further, we find that the proposed transponder transactions are otherwise consistent with the Commission's transponder sales policies.[3] Therefore, we grant Comsat General's request for transponder sales authority.

III. ORDERING CLAUSES

5. Accordingly, IT IS ORDERED that Application File No. 42-DSS-ML-93 filed by Comsat General Corporation IS GRANTED and Comsat General Corporation IS AUTHORIZED to locate SBS-3 at 72° W.L. until December 31, 1995.

6. IT IS FURTHER ORDERED that Application File No. 43-DSS-MISC-93 filed by Comsat General Corporation IS GRANTED and Comsat General Corporation IS AUTHORIZED to offer up to nine SBS-3 transponders on a non-common carrier basis pursuant to Domestic Fixed-Satellite Service Transponder Sales, 90 FCC 2d 1238 (1982), *aff'd sub nom.*, Wold Communications, Inc. v. FCC, 735 F.2d 1465 (D.C. Cir. 1984). *See also* Martin Marietta Communications Systems, Inc., 60 Rad. Reg. 2d (P&F) 779 (1986).

7. IT IS FURTHER ORDERED that this Memorandum Opinion and Order will be effective upon adoption.

FEDERAL COMMUNICATIONS COMMISSION

James R. Keegan
Chief, Domestic Facilities Division
Common Carrier Bureau

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[1] *See* Public Notice Report No. DS-1301, April 14, 1993.

[2] Comsat General conditioned its request on the Commission authorizing Hughes Communications Galaxy, Inc. to operate its Ku-band SBS-6 at 95° W.L. on an interim basis. Hughes was subsequently granted that authority. Hughes Communications Galaxy, Inc., DA 93-701, released June 22, 1993 (*Hughes Recon. Order*).

[3] *See* Domestic Fixed-Satellite Service Transponder Sales, 90 FCC 2d 1238 (1982), *aff'd sub nom.*, Wold Communications, Inc. v. FCC, 735 F.2d 1564 (D.C. Cir. 1984). *See also* Martin Marietta Communications Systems, Inc., FCC 86-232 (June 10, 1986).

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

PAN AMERICAN SATELLITE,
Complainant,

v.

COMMUNICATIONS SATELLITE CORPORATION,
Defendant.

File No. E-89-087

MEMORANDUM OPINION AND ORDER

Adopted: August 12, 1993; Released: August 20, 1993

By the Acting Chief, Common Carrier Bureau:

I. INTRODUCTION

1. In this Memorandum Opinion and Order we address a complaint filed by Pan American Satellite (PAS) against Communications Satellite Corporation (Comsat) alleging that Comsat violated the Communications Act of 1934, as amended,[1] (the "Communications Act") and the Communications Satellite Act of 1962[2] (the "Satellite Act") by constructing common carrier facilities without first obtaining Commission approval. Comsat denies the allegations and moves that the complaint be dismissed.[3] For the reasons discussed below, we deny the complaint.

II. BACKGROUND AND CONTENTIONS

2. On July 12, 1988, Comsat filed an application (File No. CSS-88-005) seeking authority to participate in the construction of up to five INTELSAT VII satellites, a "substantial addition" to the INTELSAT system. While the application was still pending[4] Comsat contributed capital to INTELSAT to be used to fund the INTELSAT VII program. PAS contends that Comsat's participation in the INTELSAT VII program before obtaining authority from the Commission constitutes a violation of Section 214(a) of the Communications Act[5] and Sections 201(c)(9) and 401 of the Satellite Act.[6] Moreover, PAS maintains that Comsat charged unjust and unlawful rates in violation of Section 201(b) of the Communications Act[7] by including these unapproved INTELSAT VII-related expenditures within its jurisdictional rate base. Accordingly, PAS asks the Commission to direct Comsat to cease participating in the INTELSAT VII program without Commission approval and to cease including expenses related to the INTELSAT VII program in Comsat's jurisdictional rate base. In addition, PAS asks the Commission to impose appropriate civil and criminal penalties on Comsat.

3. Comsat denies that it has violated the Communications Act or the Satellite Act. Comsat admits that it contributed capital to INTELSAT, that presumably a pro rata share of INTELSAT's payment to the INTELSAT VII vendor came from funds contributed by Comsat to INTELSAT, and that it included capital contributions to INTELSAT within its jurisdictional rate base. Comsat, however, maintains that these actions do not constitute a violation of either Act.[8] Comsat argues that, to the contrary, its actions were required by law. Therefore, Comsat concludes that PAS has failed to state a cause of action under either the Communications Act or the Satellite Act and that the complaint should be dismissed.[9]

4. Comsat explains that pursuant to treaty it is obligated to contribute funds to INTELSAT when requested to do so in accordance with INTELSAT agreements and that failure to do so might result in sanctions or expulsion from INTELSAT. Comsat points out that INTELSAT is not subject to U.S. law or regulation and may proceed with its

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[1] 47 U.S.C. §§ 151-711 (1988).

[2] 47 U.S.C. §§ 701-757 (1988).

[3] PAS opposed the motion to dismiss and Comsat replied to PAS's opposition.

[4] The application was granted January 11, 1990. Communications Satellite Corporation, 5 FCC Rcd 753 (1990) (*INTELSAT VII Procurement Order*).

[5] 47 U.S.C. § 214(a) (1988). This Section provides, in pertinent part, that:

> No carrier shall undertake the construction of a new line or of an extension of any line, or shall acquire or operate any line, or extension thereof, or shall engage in transmission over or by means of such additional or extended line, unless and until there shall first have been obtained from the Commission a certificate that the present or future public convenience and necessity require or will require the construction, or operation, or construction and operation, or such additional or extended line...

[6] 47 U.S.C. §§ 701(c)(9), 741 (1988). Section 201(c)(9) of the Satellite Act reads, in pertinent part, that "the Federal Communications Commission, . . . shall . . . insure that no substantial additions are made by [Comsat] or carriers with respect to facilities of the system or satellite terminal stations unless such additions are required by the public interest, convenience, and necessity..." Under Section 401 of the Satellite Act, Comsat is "deemed to be a common carrier" and is "fully subject" to Title II of the Communications Act.

[7] 47 U.S.C. § 201(b) (1988). This Section provides, in pertinent part, that "[a]ll charges, practices, classifications, and regulations for and in connection with such communication service, shall be just and reasonable, and any such charge, practice, classification, or regulation that is unjust or unreasonable is hereby declared to be unlawful."

[8] Motion of Communications Satellite Corporation to Dismiss Complaint of Pan American Satellite (Motion to Dismiss) at 2. Comsat also denies an allegation raised by PAS that Comsat engaged in a pattern of ignoring mandated procedures by providing financial information to the Commission just 10 days, rather than the required 60 days, before the INTELSAT Board of Governors (the "Board") authorized a contract procuring five INTELSAT VII satellites. Comsat notes that the Commission has already addressed the timeliness of Comsat's supplemental filings in its grant of Comsat's application. *See INTELSAT VII Procurement Order*, 5 FCC Rcd at 761.

[9] Because we are denying PAS's complaint, we will dismiss as moot Comsat's Motion to Dismiss.

procurement program without regard to Commission action on Comsat's application. Comsat maintains that there is also "no law, regulation, or rule that the Commission must grant COMSAT's application before COMSAT may respond to a request from INTELSAT for funds for that program.[10] To support its position, Comsat states that the Commission has acknowledged that Comsat is required to provide funds when requested to do so by INTELSAT and has sanctioned Comsat's participation in INTELSAT procurement before formal Commission approval.[11] As to the PAS argument that Comsat has included the INTELSAT VII expenditures in its jurisdictional rate base in violation of the Communications Act, Comsat counters that the Commission has consistently found that Comsat's capital contributions to INTELSAT should be included in the rate base as construction work in progress and that these capital contributions are jurisdictional costs to be included in Comsat's jurisdictional accounts when they are paid to INTELSAT.[12] Comsat adds that there is no written or unwritten requirement that the Commission formally approve Comsat's participation in an INTELSAT procurement before it may include the contributions in its jurisdictional accounts.[13]

5. PAS responds that the Communications Act and the Satellite Act require prior approval before Comsat may participate in INTELSAT's programs.[14] Moreover, PAS contends that "any tension that may exist between the U.S. statutory prior approval requirement and Comsat's obligations to Intelsat should be resolved by the Commission, not Comsat."[15] PAS maintains that Comsat's "unilateral decision to contribute to the Intelsat VII program has deprived interested parties of the opportunity to participate meaningfully in the Commission's decisionmaking process."[16] PAS argues that since the Commission has decided that the instructional process is not subject to the Administrative Procedure Act,[17] it is particularly important that interested parties be able to raise concerns at a time when the Commission can act on those concerns.[18] PAS further argues that the Commission's possible *ex post facto* remedy of ordering Comsat to remove the investment from its rate base is insufficient. PAS contends that by presenting the Commission with a *fait accompli*, Comsat "deprives the Commission of the opportunity to strike a balance between the Comsat/Intelsat interest, on one hand, and the interests of ratepayers and other interested parties, on the other."[19]

6. PAS contends that the Commission has held that common carriers may not include new construction costs in their rate base before obtaining Section 214 authority.[20] According to PAS, any authority cited by Comsat to the contrary deals only with the issue of which accounting method Comsat should use to handle property under construction.[21] Furthermore, PAS argues that not all of Comsat's jurisdictional expenditures can routinely be charged to U.S. ratepayers.[22]

III. DISCUSSION

7. After a thorough review of the record, we agree with Comsat that it has not violated either the Communications Act or the Satellite Act by participating in an INTELSAT procurement before the Commission acted on Comsat's application. As the Commission has previously recognized, Comsat's participation in an INTELSAT program is mandated by international agreement:

> If INTELSAT commits to a program, with or without Comsat's support, Comsat is also committed to that program and, consequently, to its share of the associated costs. Thus, INTELSAT's decision not only commits Comsat but also influences, if not controls, a major portion of Comsat's rate base. Comsat could not refuse to pay its assigned share and still remain a Signatory to INTELSAT...[23]

8. The Commission has also previously rejected a PAS suggestion that the Commission prohibit Comsat from making financial contributions to an INTELSAT procurement until Comsat's application had first been approved.[24] The results of such a bar, possible exclusion from INTELSAT, would clearly be contrary to the intent of Congress in enacting the Satellite Act. As the Commission explained:

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[10] Motion to Dismiss at 7.

[11] According to Comsat, since 1980 every formal order authorizing Comsat to participate in INTELSAT procurements was issued many months, or even years, after the INTELSAT Board approved the procurement. Motion to Dismiss at 9.

[12] Motion to Dismiss at 11-13 (citing Communications Satellite Corporation, 68 FCC 2d 941 (1978); Communications Satellite Corporation, 82 FCC 2d 377 (1980) (*INTELSAT V Construction Order);* Communications Satellite Corporation, Application for Authority to Participate in the Construction of INTELSAT VI Communications Satellites to be Used as Part of the INTELSAT Global Satellite System, FCC 84-236 (released May 25, 1984)).

[13] Motion to Dismiss at 13-14.

[14] Opposition of Pan American Satellite (PAS Opposition) at 4-6.

[15] *Id.* at 3.

[16] *Id.* at 4.

[17] 5 U.S.C. §§ 551-559 (1988). *See* Communications Satellite Corporation, 3 FCC Rcd 7108, 7110-11 (1988) (*Planned Domestic Services Order*).

[18] PAS Opposition at 11.

[19] *Id.* at 9. PAS suggests that there is a period of several months after INTELSAT makes a procurement decision in which Comsat "could decline to make procurement-related payments at no risk." *Id.* at 10. Requiring Comsat to withhold payment during this period, PAS reasons, would give the Commission enough time to make a decision on the application. According to PAS, this period includes the time from the Board decision until INTELSAT requests payment, plus the three months during which a Signatory may fulfill its obligations under the Agreement by paying principal plus accrued interest. Moreover, PAS notes that during this period Comsat may seek arbitration of its payment obligation.

[20] *Id.* at 13 (citing RCA Global Communications, Inc., 56 FCC 2d 660, 698 & n.36 (1975) (*RCA Global)*).

[21] PAS Opposition at 12. PAS maintains that the Commission has never addressed the specific issue of whether Comsat may burden ratepayers with procurement expenses that Comsat has not yet been authorized to incur.

[22] *Id.* at 13. PAS points out that the Commission has directed Comsat to exclude from rate base capital contributions to INMARSAT that involved provision of aeronautical mobile service. *Id.* (citing Communications Satellite Corporation, 4 FCC Rcd 1994, 1996 n.8 (1989) (*INMARSAT Procurement Order)*).

[23] *INTELSAT V Construction Order,* 82 FCC 2d at 380 (footnotes omitted). *See also* Communications Satellite Corporation, 2 FCC Rcd 7474, 7476 n.8 (Com. Car. Bur. November 30, 1987).

[24] *Planned Domestic Services Order,* 3 FCC Rcd at 7110.

> [A]s the U.S. Signatory to INTELSAT, Comsat is responsible for a portion of INTELSAT's costs. Failure to pay any amount due within three months may result in suspension of Comsat's rights under the INTELSAT Agreement and Operating Agreement. If payment is not made within six months of suspension, Comsat may be deemed to have withdrawn from INTELSAT.[25]

9. Furthermore, contrary to PAS's allegations, the Commission, not Comsat, has balanced the tension between statutory requirements and considerations of international comity by formulating procedures governing Comsat's application process.[26] Taking into account Comsat's role in INTELSAT, the Commission designed these procedures for the express purpose of providing opportunity for public comment, advancing the public interest, and encouraging efficiency.[27] Furthermore, the Commission has made it clear that its decisions approving a Comsat application are not based on the fact that INTELSAT has already committed to the program.[28] If the Commission should find that the public interest, convenience and necessity require that Comsat's application be disapproved, the Commission has the option of "disallowing part of Comsat's investment from its rate base or ordering a change in the methods of accounting for the expenditures."[29] There is, therefore, no basis for PAS's contention that Commission procedures governing Comsat's application process preclude PAS and other interested parties from giving meaningful input into the application process.

10. Finally, PAS has not persuaded us to reverse prior decisions which allow Comsat to automatically include these capital outlays in its rate base when the payments are made to INTELSAT.[30] As the Commission has previously stated: "[u]nder the settlement agreement in the Comsat Rate Case ... Comsat may automatically include its committed contributions in its rate base even before space segment plant and related equipment become operational."[31] Thus, the Commission views this agreement as going beyond a mere determination of which methods Comsat should use in accounting for construction outlays as PAS alleges. Rather, the Commission has always expected that payments to INTELSAT will be included in Comsat's jurisdictional rate base as they are made.[32] This position is reflected in the Commission's recognition of the fact that an INTELSAT procurement decision "not only commits Comsat but also influences, if not controls, a major portion of Comsat's rate base."[33] Therefore, just as Comsat is not barred by Section 214 of the Act from responding to an INTELSAT request for funds before the Commission has issued a decision on Comsat's application, Comsat is also not precluded from automatically including those payments in its rate base.[34] Should the Commission not approve any of Comsat's applications, the Commission may

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[25] *Id.* (footnotes omitted).

[26] Statement of Policy Concerning Procedures Applicable to Comsat's Applying for Commission Authorization to Participate in Certain INTELSAT Activities, 46 FCC 2d 338 (1974).

[27] *Id.* In light of Comsat's obligations under the INTELSAT Agreements and the Commission's procedures allowing opportunity for public comment, Comsat need not incur any additional interest costs by waiting for three months before making its required capital contribution as PAS suggests.

[28] *See, e.g.,* Communications Satellite Corporation, 5 FCC Rcd 5952, 5956 (1990).

[29] *INTELSAT V Construction Order,* 82 FCC 2d at 380; *Planned Domestic Services Order,* 3 FCC Rcd at 7113 n.10. PAS suggests that this remedy is inadequate because any decision to employ it will be complicated by interjecting difficult disinvestment considerations into the proceeding. Undermining PAS's position is the fact that the Commission has applied this remedy by ordering Comsat not to include aeronautical-related costs from its INMARSAT rate base and to remove lobbying expenses from its jurisdictional INTELSAT accounts. *See* Communications Satellite Corporation, 2 FCC Rcd 390 (1987). *See also INMARSAT Procurement Order,* 4 FCC Rcd at 1996 n.8 ("We will continue to require Comsat to isolate capital and expense costs associated with the aeronautical portion of its INMARSAT activities, and to separate its aeronautical accounts from other accounts used to compute rates to maritime users.") and Pan American Satellite v. Communications Satellite Corporation, Mimeo No. 4988 (Com. Car. Bur. June 6, 1985) (*Comsat Lobbying Order), recon. denied,* 1 FCC Rcd 111 (1986) (*Comsat Lobbying Recon. Order).* Clearly, the Commission has demonstrated it is willing and able to rectify any Comsat action not in the public interest.

[30] *See, e.g.,* Communications Satellite Corporation, FCC 86-173, para. 29 (released Apr. 17, 1986).

[31] *See, e.g., INTELSAT V Construction Order,* 82 FCC 2d at 380 n.12 (cite omitted).

[32] PAS argues that not all jurisdictional expenditures can be charged to U.S. ratepayers as a matter of course. PAS relies upon two Commission decisions for this proposition. The underlying facts in these decisions are not, however, analogous to the facts here. In the *INMARSAT Procurement Order,* 4 FCC Rcd at 1994, the Commission directed Comsat to continue to exclude from its rate base capital contributions to INMARSAT since the Commission had previously determined that Comsat was not authorized to participate in INMARSAT's aeronautical service program. Then, in the *Comsat Lobbying Order,* the Bureau determined that Comsat could not include in its rate base its share of INTELSAT's lobbying expenditures on separate systems issues. The Commission reconsideration makes clear that lobbying expenses have always been treated differently from other expenses since, in the words of the Commission, "all carriers are expected to know that lobbying expenses are to be included in non-operating below-the-line' accounts..." *Comsat Lobbying Recon. Order,* 1 FCC Rcd at 113.

[33] *INTELSAT V Construction Order,* 82 FCC 2d at 380.

[34] PAS cites *RCA Global,* 56 FCC 2d at 698 & n.36 for the proposition that Comsat must first obtain Section 214 approval before including INTELSAT construction costs in its rate base. PAS's reliance on *RCA Global* is misplaced. In *RCA Global,* RCA Global Communications, Inc. (RCA Globcom), an international record carrier, filed applications with the Commission for the authority to construct satellites and earth stations to be used for a domestic communications system. As a condition of granting its approval, the Commission ordered RCA Corporation, the parent company of RCA Globcom, to create a new and entirely separate corporation for the provision of domestic service. The Commission further ordered RCA Globcom to divest itself of all interests in the domestic satellite system. Under these unique circumstances, the Commission stated that RCA Globcom could include in its rate base only those parts of the interim domestic satellite system for which it had already received prior construction authority. Furthermore, the Commission instructed RCA Globcom to remove from its rate base its investment in these authorized facilities once the domestic satellite system became operational. In stating that Commission approval was necessary before including construction costs in rate base, the Commission was concerned then with accounting for transactions among the existing RCA Corporation subsidiaries and the entirely new corporate entity yet to be formed.

then exercise either the option of disallowing the payment from Comsat's rate base or of changing accounting methods.[35]

IV. CONCLUSION

11. In view of the foregoing, we conclude that PAS has not met its burden of showing that Comsat violated Sections 201(b) and 214(a) of the Communications Act or Sections 201(c)(9) and 401 of the Satellite Act. Nor has PAS shown that the Commission should grant any of the relief PAS requested in its complaint.

V. ORDERING CLAUSES

12. Accordingly, IT IS ORDERED, pursuant to Sections 4(i) and 208 of the Communications Act of 1934, as amended, 47 U.S.C. §§ 154(i) and 208, and the authority delegated under Section 0.291 of the Commission's rules, 47 C.F.R. § 0.291, that Pan American Satellite's Complaint IS DENIED.

13. IT IS FURTHER ORDERED that Communications Satellite Corporation's Motion to Dismiss IS DISMISSED as moot.

FEDERAL COMMUNICATIONS COMMISSION

Kathleen B. Levitz
Acting Chief, Common Carrier Bureau

[35] *See supra* note 29 and accompanying text.

Before the
Federal Communications Commission
Washington, D.C. 20554

In the matter of

Sacramento-Valley Limited Partnership — File No. 316MS0018

Notice of Apparent Liability
for Forfeiture Penalty for
Station KNKN219 in the Domestic
Public Cellular Radio Telecommunications
Service to serve RSA Market 345B,
California 10 - Sierra

NOTICE OF APPARENT LIABILITY FOR FORFEITURE

Adopted: August 16, 1993; Released: August 17, 1993

By the Chief, Mobile Services Division:

1. On June 13, 1991, Contel Cellular of California, Inc. (Contel) was granted authority to construct a facility at the Donner Ski Ranch (Ranch), which is located within the California Rural Service Area (RSA) 10 - Sierra (Sierra RSA). Contel placed the Ranch facility into service on November 6, 1991. On November 20, 1991, the Commission granted an assignment of license for the Sierra RSA from Contel to Sacramento-Valley Limited Partnership (SVLP), consummated on December 31, 1991. PacTel Cellular (PacTel) is the general partner of SVLP.[1]

2. On August 24, 1992, PacTel informed the Commission that despite Contel's having filed an FCC Form 401 (application for New or Modified Common Carrier Radio Station Authorization) which was approved in June 1991, and which included the Ranch site, Contel had not filed FCC Form 489 notifying the Commission that construction had been completed and operations were to begin. PacTel further states that the Ranch facility was not included on the Radio Station Authorization (Form 463 Radio Station Authorization), *i.e.*, the license issued by the Commission in July 1992. PacTel simultaneously filed a request for Special Temporary Authority (STA) to continue operation of the station pending action on FCC Form 401, filed September 9, 1992. The STA was granted.

3. Section 301 of the Communications Act, 47 U.S.C. § 301, provides in relevant part:

> No person shall use or operate any apparatus for the transmission of energy or communications or signals by radio... except under and in accordance with this Act and with a license in that behalf granted under the provisions of this Act.

Similarly, Section 22.3 of the Commission's Rules, 47 C.F.R. § 22.3, states:

> No person shall use or operate any device for the transmission of energy or communications by radio in the services authorized by this part except as provided in this part.

4. Section 22.9(b)(1) of the Commission's Rules states:

> *Notification of status of facilities. (FCC Form 489).* When construction has been completed in accordance with the radio station authorization, the licensee shall so notify the Commission using Form 489. Licensees can commence service the day Form 489 is placed in the mail to the FCC.

Therefore, because SVLP commenced operation of the Ranch facility without authorization and without timely filing FCC Form 489 with the Commission, it is in apparent violation of Section 301 of the Communications Act and Sections 22.3 and 22.9(b)(1) of the Commission's Rules.

5. Section 503(b) of the Communications Act, 47 U.S.C. § 503, states in pertinent part:

> Any person who is determined by the Commission, in accordance with paragraph (3) or (4) of this subsection, to have--
>
> (B) willfully or repeatedly failed to comply with any of the provisions of this chapter or of any rule, regulation, or order issued by the Commission under this chapter... shall be liable to the United States for a forfeiture penalty.

We find that SVLP's unauthorized operation of the Ranch facility constitutes willful and repeated conduct within the terms of the statute[2] because PacTel by its own admission operated the station from the time of assignment of license without authority.

6. Pursuant to the Commission's *1993 Policy Statement, Standards for Assessing Forfeitures*, FCC 93-382, released Aug. 12, 1993, the base forfeiture amount for unauthorized operation is $20,000. Consistent with the *Policy Statement*, we are adjusting downward the $20,000 base forfeiture to

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[1] At that time, SVLP was 100 percent owned and wholly controlled by PacTel Corporation, which in turn is 100 percent owned and wholly controlled by Pacific Telesis Group. On January 21, 1993, a *pro forma* transfer of control from SVLP to the Shareholders of Pacific Telesis Group was filed and was granted on March 5, 1993.

[2] Section 312(f)(1) of the Communications Act, 47 U.S.C. § 312(f)(1), provides:

> The term "willful", when used with reference to the commission or omission of any act, means the conscious and deliberate commission or omission of such act, irrespective of any intent to violate any provision of this Act or any rule or regulation of the Commission authorized by this Act or by a treaty ratified by the United States.

This definition applies to Section 503(b) of the Communications Act. *See Southern California Broadcasting Co.*, 6 FCC Rcd 4387 (1991).

Section 312(f)(2) of the Communications Act, 47 U.S.C. § 312 (f)(2), provides:

$14,000 because PacTel, on behalf of SVLP, voluntarily disclosed SVLP's unauthorized operation. Therefore, the total forfeiture for which SVLP is apparently liable is $14,000.

7. Accordingly, pursuant to Section 503(b) of the Communications Act of 1934, 47 U.S.C. Section § 503(b) and Section 1.80 of the Commission's Rules, 47 C.F.R. § 1.80, Sacramento-Valley Limited Partnership IS APPARENTLY LIABLE FOR A FORFEITURE in the amount of Fourteen Thousand Dollars ($14,000) for willful and repeated violations of the aforementioned statutory and rule provisions. The amount specified was determined after consideration of the factors set forth in Section 503(b)(2) of the Communications Act of 1934.

8. Payment of the forfeiture may be made within thirty (30) days of the release date of this order by mailing a check or similar instrument, noting on the payment the File Number of the above captioned proceeding and payable to the order of the Federal Communications Commission at: Federal Communications Commission, P.O. Box 73482, Chicago, Illinois 60673-7482.

9. A copy of this Notice is being sent to Sacramento-Valley Limited Partnership, 1275 Pennsylvania Ave. N.W., Suite 400, Washington, D.C. 20037, by Certified Mail, Return Receipt Requested.

FEDERAL COMMUNICATIONS COMMISSION

John Cimko
Chief, Mobile Services Division
Common Carrier Bureau

The term "repeated", when used with reference to the commission or omission of any act, means the commission or omission of such act more than once or, if such commission or omission is continuous, for more than one day. This definition applies to Section 503(b) as well. *See* H. R. Rep. No. 97-765, 97th Cong. 2d Sess. 50-51 (1982).

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

ALLNET COMMUNICATIONS SERVICES, INC. — FOIA Control No. 92-20

Freedom of Information Act Request

MEMORANDUM OPINION AND ORDER

Adopted: August 12, 1993; Released: August 17, 1993

By the Commission:

1. The Commission has under consideration an Application for Review filed on March 16, 1992, by Allnet Communications, Inc. (Allnet), appealing a February 14, 1992 Freedom of Information Act (FOIA) decision by the Chief, Common Carrier Bureau. For the reasons discussed herein, we grant Allnet's application for review.

2. By request dated January 24, 1992, Allnet sought access to, *inter alia,* all correspondence documenting the presubscribed line counts (line counts) of interexchange carriers and local exchange carriers filed with the Commission by the National Exchange Carrier Association since May 1, 1991. The Bureau determined that, with the exception of the line count for Telefonica Larga Distancia (TLD), the line counts are not exempt from public disclosure under the FOIA and therefore must be made available for public inspection. The Bureau noted that, although TLD is an interexchange carrier, it operates exclusively in the Puerto Rico market. The Bureau therefore reasoned that it would be competitively damaging to release information showing TLD's market share for such a limited geographic area. The Bureau thus concluded that TLD's line count was exempt from disclosure pursuant to Exemption 4 of the FOIA, 5 U.S.C. § 552(b)(4), which permits withholding of "trade secrets and commercial and financial information obtained from a person and privileged or confidential."

3. On appeal, Allnet argues that the line counts for TLD should not be afforded Exemption 4 protection. Further, Allnet notes that, although the Bureau determined that line counts for all other exchange carriers must be made available, the Bureau inexplicably did not release the line counts of Alascom, Inc., General Communication, Inc. and Puerto Rico Tel-Com.

4. We conclude that the line counts of Alascom Inc., General Communication, Inc. and Puerto Rico Tel-Com may not be withheld from public disclosure. None of these carriers requested confidential treatment for the information and no basis exists to treat any of this information as confidential. Therefore, the line counts for these carriers must be made publicly available under the FOIA.

5. We also determine that TLD's line count is not entitled to protection pursuant to Exemption 4. It is well established that if information is freely available from other sources it cannot be deemed "confidential" within the meaning of Exemption 4. *See Anderson v. HHS,* 907 F. 2d 936, 952 (10th Cir. 1990); *Worthington Compressors, Inc. v. Costle,* 662 F.2d 45, 51 (D.C. Cir. 1981). TLD's line count is easily obtained by performing a simple calculation using material which is routinely available from sources other than TLD.[1] Therefore, TLD has not demonstrated that the material in question is confidential.[2]

6. In view of the foregoing, the application for review filed on behalf of Allnet Communications Services, Inc. IS GRANTED. Telephonica Larga Distancia will be accorded 10 working days from the release date of the Order in which to seek a judicial stay. *See* 47 C.F.R. § 0.461(h)(4).[3]

7. The officials responsible for this action are the following Commissioners: James H. Quello, Chairman, Andrew C. Barrett, and Ervin S. Duggan.

FEDERAL COMMUNICATIONS COMMISSION

William F. Caton
Acting Secretary

[1] Because the nationwide total line count and the line counts of all other carriers are publicly available, TLD's line count may be deduced simply by subtracting the total lines of all other carriers from the nationwide total.

[2] Because TLD's line count cannot be deemed confidential we need not address the Bureau's determination that disclosure of TLD's line count would likely cause TLD substantial competitive harm.

[3] In its application for review, Allnet also questions why it has not received the line counts for each of the LECs. These materials are available for public inspection in the Commission's Industry Analysis Public Reference Room. Allnet may also request copies of this information from the Commission's copy contractor. *See* 47 C.F.R. § 0.465.

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

ALLNET COMMUNICATIONS SERVICES, INC. — FOIA Control No. 92-149

Freedom of Information Act Request

MEMORANDUM OPINION AND ORDER

Adopted: August 6, 1993; Released: August 17, 1993

1. The Commission has under consideration a Further Application for Review filed on November 5, 1992, by Allnet Communications Services, Inc. (Allnet), appealing an October 6, 1992 Freedom of Information Act (FOIA) decision by the Chief, Common Carrier Bureau. (*Further Order*).[1] For the reasons discussed herein, we grant in part and deny in part Allnet's Further Application for Review.

BACKGROUND

2. On July 22, 1992, Arthur Anderson & Co. filed with the Commission a report (the Anderson study) explaining and analyzing in detail the Switching Cost Information System (SCIS) and Switching Cost Model used by the Bell Operating Companies (BOCs) to apportion joint and common costs between the multiple switch functions used to provide unbundled service features. These models are used to implement Open Network Architecture (ONA).[2]

3. On July 24, 1992, Allnet filed a FOIA request asking that the Anderson study be made publicly available. Subsequently, and prior to the Bureau's ruling on Allnet's FOIA request, Arthur Anderson submitted to the Commission a redacted version of the report that was made available to parties, including Allnet, who were required to execute a nondisclosure agreement with Bell Communications Research (Bellcore) and the BOCs as a condition of access. The Bureau's FOIA ruling concluded that both versions of the study were exempt from disclosure in their entirety. Allnet then filed an Application for Review of that decision. After further review, and before the Commission could act on Allnet's initial appeal, the Bureau released its *Further Order* wherein it determined that portions of the redacted study could be made available without compromising software and vendor data material that the Commission and a federal district court, in prior decisions, had deemed to be exempt from disclosure. *See Allnet Communication Services, Inc. FOIA Control No. 92-266*, 7 FCC Rcd. 6329 (1992) (*SCIS FOIA Order); Allnet Communication Services , Inc. v. Federal Communications Commission*, Civil Act. No. 92-1350 (CRR) (D.D.C., Aug. 31, 1992), *appeal pend.* D.C. Circuit No. 92-5351, filed Sept. 25, 1992 (*Allnet v. FCC)*. Specifically, the Bureau made available for public inspection Sections 1 through 3 of the Anderson study and portions of Appendices 2, 3, 15, 17 and 18. Allnet's Further Application for Review seeks public disclosure of the redacted version of the Anderson study (and the appendices) in its entirety.

DISCUSSION

4. Pursuant to Exemption 4 of the FOIA, an agency may withhold information consisting of "trade secrets and commercial or financial information obtained from a person and privileged or confidential." 5 U.S.C.§ 552(b)(4). The issue we need to resolve in this application for review is whether the materials sought are confidential or privileged. In *National Parks and Conservation Ass'n v. Morton*, 498 F. 2d 765, 770 (D.C. Cir. 1974), the court held that this criterion is satisfied if either (1) disclosure of the information sought is likely to impair the government's ability to obtain necessary information in the future; or (2) disclosure is likely to cause substantial harm to the competitive position of the person from whom the information was obtained. The D.C. Circuit recently reaffirmed this test, but confined it to cases involving information that persons were required to provide to the government. For cases involving information that was voluntarily supplied to the government, the court has adopted a new test. Financial or commercial information provided to the government on a voluntary basis is exempt under Exemption 4 "if it is of a kind that the provider would not customarily release to the public." *Critical Mass Energy Project v. NRC*, 975 F. 2d 871 (D.C. Cir. 1992). Additionally, Exemption 4 may be invoked where disclosure of the information would impair the effectiveness of a government program. *See 9 to 5 Org. for Women Office Workers v. Board of Governors of the Fed. Reserve System*, 721 F. 2d 1, 10 (1st Cir. 1983).

5. Sections 4 through 6 of the Anderson study and parts of the redacted version of Appendices 5, 6-9 and 12 contain detailed descriptions of the SCIS model and its application. For example, Appendices 5-9 contain feature input variables that reveal the framework of the SCIS. Appendix 12 describes the elements of the SCIS Model Office Equation software module. As noted above, the Commission and the district court, after a *de novo* review, have determined that disclosure of the SCIS model would result in competitive harm to Bellcore. It is axiomatic that if the underlying data qualifies for withholding, a study that explains and analyzes in detail such material may likewise be withheld. Therefore, we will not repeat the exhaustive explanations for withholding this material set forth in prior decisions and, instead, incorporate by reference the rationale expressed in the *SCIS FOIA Order* and in *Allnet v. FCC*.

6. The remaining portions of Appendices 6-9 and 12, as well as Appendix 4 (all of which was withheld in both the redacted and unredacted versions, but which Allnet apparently wishes us to release in its entirety) and the redacted versions of Appendices 5, 16, 19, 22-27 reveal specific

[1] Letter from Chief, Common Carrier Bureau to J. Scott Nichols, dated October 6, 1992.

[2] Hereafter, we use the term SCIS to refer to all computer models used by the BOCs to develop basic service element (BSE) costs for ONA implementation.

switch architecture or switch pricing methodology, the release of which would result in competitive harm to the switch vendors.[3] For example, contrary to Allnet's assertion that Appendix 4 contains information common to all switches, that appendix identifies model office and default table input variables that drive the cost of a *specific* switch technology. Similarly, Appendix 12 contains a description of the partitioning process that occurs within the SCIS model (*i.e.*, the listing of cost components distinct to each individual switch type which are then re-assembled by the software into an archtypal office) and reveals functional elements of a particular switch.

7. Again, we incorporate by reference the detailed analysis contained in the *SCIS FOIA Order* and in *Allnet v. FCC* explaining the competitive nature of the switch market and specifically how release of switch vendor data would cause substantial competitive harm. Therefore, we conclude the Bureau properly withheld this material pursuant to the competitive harm prong of the *National Parks* test.[4]

8. Moreover, to the extent that the materials represent data that is voluntarily submitted by the switch manufacturers for the purpose of conducting SCIS analyses, we determine that the material is properly withheld pursuant to the test established in *Critical Mass* because the manufacturers have demonstrated that they would not customarily release this information to the public. *See Allnet v. FCC*, slip op. at 13.

9. Additionally, these materials may be withheld pursuant to the program effectiveness prong of Exemption 4. The implementation of ONA is a significant priority of this Commission and is part of our mandate to prevent unreasonable and discriminatory service rates. The SCIS models are critical to our review of the rates. Further, the switch vendors have made clear that they would be reluctant to supply proprietary information to the carriers in the future if the Commission makes such information publicly available. Without vendor input, the SCIS model would not be a useful tool and as a result the Commission's ability to administer ONA would be dramatically impaired. *See Allnet v. FCC*, slip op. at 14.[5]

10. However, we believe that the redacted version of Appendices 1 and 20 do not contain confidential material and we will, therefore, make them publicly available. Appendix 1 contains switch-related information, but it is displayed on a averaged basis. Hence, it does not disclose confidential information pertaining to any one switch manufacturer nor is it in any way competitively sensitive. Appendix 20 contains information that is already publicly available. Consequently, these appendices are not entitled to Exemption 4 protection. We therefore grant Allnet's application for review with respect to these appendices.

CONCLUSION

11. In view of the foregoing, the Application for Review filed by Allnet Communications Systems, Inc. IS DENIED IN PART AND GRANTED IN PART. Allnet may seek judicial review of this decision pursuant to 5 U.S.C. §552(a)(4)(B). In addition, interested parties will be afforded 10 working days from the release date of this Order in which to seek a judicial stay. *See* 47 C.F.R. §0.461(h)(4).

12. The officials responsible for this action are the following Commissioners: James H. Quello, Chairman, Andrew C. Barrett, and Ervin S. Duggan.

FEDERAL COMMUNICATIONS COMMISSION

William F. Caton
Acting Secretary

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[3] We note that Allnet requests that unredacted portions of Appendix 11 be made publicly available. There are, however, no unredacted portions of this appendix.

[4] Although Allnet correctly stated that the Bureau's *Further Order* determined that information in Appendix 27 "does not directly compromise vendor or Bellcore proprietary information," we conclude that public release of this appendix could result in competitive harm to the switch vendors. This appendix provides percentage amounts of digital and analog switches in each BOC's network that are used to provide specific BSEs. Because the vast majority of analog switches in use are AT&T's 1AESS switches, the seemingly innocuous percentage amounts can be used as a valuable key to reveal other competitively sensitive information concerning particular switches.

[5] Allnet's Further Application for Review specifically seeks release of the redacted version of the Anderson study. To the extent that Allnet may be challenging the Bureau's decision to withhold additional material contained only in the unredacted version, we conclude that the Bureau properly justified its decision to withhold this material pursuant to Exemption 4 of the FOIA.

Before the
FEDERAL COMMUNICATIONS COMMISSION FCC 93-177
Washington, D.C. 20554

In the Matter of	)	
	)	
Implementation of Sections of	)	MM Docket 92-266
the Cable Television Consumer	)	
Protection and Competition Act	)	
of 1992	)	
Rate Regulation	)	

Report and Order
and
Further Notice of Proposed Rulemaking

Adopted: April 1, 1993 Released: May 3, 1993

By the Commission: Commissioner Marshall not participating; Commissioners Barrett and Duggan issuing separate statements.
Comment Date: June 17, 1993
Reply Comment Date: July 2, 1993

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I. Introduction

1. This Report and Order and Further Notice of Proposed Rulemaking ("Report and Order") and ("Further Notice") amends our rules to implement Sections 623 (subscriber rate regulation), 612 (commercial leased access), and 622(c)(subscriber bill itemization), of the Communications Act of 1934, as amended by the Cable Television Consumer Protection and Competition Act of 1992 ("Cable Act of 1992 or "1992 Cable Act").[1] The Report and Order reflects, in large part, the Commission's efforts to ensure that cable subscribers nationwide enjoy the rates that would be charged by cable systems operating in a competitive environment. The Further Notice examines whether the Commission should refine its initial analysis by excluding the rates of cable systems with less than 30 percent penetration, even though such systems are defined as systems that face effective competition under the 1992 Cable Act.

2. The Cable Act of 1992 generally provides that where competition is present, cable television rates shall not be subject to regulation by government but shall be regulated by the market. The Act contains a clear and explicit preference for competitive resolution of issues where that is feasible.[2] Other provisions of the Act, also being implemented today in a separate proceeding,[3] are intended to assure that the potential for competition to cable is given every possibility of becoming a reality. However, where competition is absent, cable rates are to be regulated to protect the interests of subscribers. This regulation is to be undertaken jointly by the Federal Communications Commission and by state and local governments. For purposes of allocating that responsibility, the services offered by cable systems are divided into several categories.

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[1] Cable Television Consumer Protection and Competition Act, Pub. L. No. 102-385, §§ 3, 9, 14, 106 Stat. 1460 (1992) ("Cable Act of 1992"). The Cable Act of 1992 became law on October 5, 1992. This proceeding was commenced through the issuance of our Notice of Proposed Rule Making in Docket 92-266, 8 FCC Rcd 510 (1992) ("Notice"). The Commission is required to prescribe regulations to carry out its obligations under the rate regulation provisions of the Act within 180 days of the law's enactment.

[2] Communications Act, § 623(a)(2), 47 U.S.C. § 543(a)(2) ("Preference for Competition.")

[3] Report and Order in Docket 92-265, FCC 93-173 (released April 30, 1993).

3. The first category is the "basic service tier" that includes, at minimum, the broadcast signals distributed by the cable operator (except for superstations), along with any public, educational, and government (PEG) access channels that the local franchise authority requires the system operator to carry on the basic tier. This tier of service, at the discretion of the cable operator, may also include additional program services. Regulation of rates for this category of service is generally the responsibility of state and local governments. Equipment used to receive the basic service tier is also to be regulated by them. However, although the primary responsibility is that of local government, regulation is to be undertaken only upon certification of the local authority's regulatory qualifications by the Commission. Substantive and procedural rules to govern regulation of basic rates are to be adopted by the Commission, which is also to serve as an appellate body to review local rate decisions. In certain circumstances, the Commission is itself required to stand in the place of the local authorities and directly regulate basic service tier rates.

4. The second category of service, called "cable programming service," includes all video programming distributed over the system that is not on the basic service tier and for which the operator does not charge on a per channel or per program basis. This category of service is subject to regulation by the Commission and only in response to specific complaints regarding an operator's cable programming service. The third category of service includes video programming for which the operator does charge a per channel or per program fee. The rates for this service are not subject to regulation by either local governments or the Commission. Finally, under the Act, cable systems are also required to make certain of their channels available for lease by outside unaffiliated parties. The conditions of offering and rates for these channels are subject to Commission regulation.

5. Our tasks in this proceeding are to: 1) develop a process for identifying those situations where effective competition exists (and rate regulation is thus precluded), 2) establish the boundaries between local and state, and federal responsibilities, 3) develop procedural and substantive rules to govern the regulation of basic service tier, cable programming service, and leased channel rates, and 4) create a process of gathering information to facilitate the regulation that is being undertaken and periodically review its effectiveness.

6. To analyze the issues, some historical context is necessary. Cable television has long been recognized as having significant potential to increase both the competitiveness and the diversity of our telecommunications system. As long ago as 1972, the Commission made reference to cable television as "an

emerging technology that promises a communications revolution."[4] Industry growth, however, was for many years uneven and uncertain, a circumstance attributed in significant part to unnecessary and uncoordinated regulation. As a response, Congress enacted the Cable Communications Policy Act of 1984.[5] One of the stated purposes of the 1984 Act was to "promote competition in cable communications and minimize unnecessary regulation that would impose an undue economic burden on cable systems." [6] Congress believed that reduced regulation would enable the cable industry to prosper, "benefiting both consumers and industry participants alike."[7]

7. The 1984 Act achieved many of its objectives. The number of communities and homes served by cable grew dramatically. System channel capacity increased and continues to do so. New channels of programming were created and investment in programming multiplied.[8] The 1984 Act, however, generally was not successful in creating a competitive multichannel video distribution marketplace as cable systems continued to develop without direct multichannel video competitors. Thus, consumers were left without the protections with respect to cable rates and customer service that they would have had in a more competitive environment. The challenge presented by this situation was how to preserve and extend the benefits of increased investment, programming diversity, and technical innovation that cable provides while protecting subscribers from noncompetitive rate

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[4] Cable Television Report and Order, 36 FCC 2d 143, 210 (1972).

[5] Pub. L. No. 98-549, §1 et. seq., 98 Stat. 2779 (1984).

[6] Communications Act, § 601(6), 47 U.S.C. § 521(6).

[7] House Committee on Energy and Commerce, H.R. Rep. No. 102-628, 102d Cong., 2d Sess. at 10 ("House Report").

[8] See, e.g., House Report at 56 ("The Committee notes that in the 7 years since passage of the Cable Act, the cable industry has experienced tremendous growth. Cable penetration has increased from 37 percent of television households in January 1985 to approximately 61 percent in June 1992. In addition, during this period cable advertising revenues increased five-fold, from less than $600 in 1984 to approximately $3 billion in 1991. Moreover, the quality and diversity of programming available to consumers and cable's annual investment in programming has increased greatly."); H.R. Conf. Rep. No. 862, 102d Cong., 2d Sess. at 56 (1992) ("Conference Report"),; Senate Committee on Commerce, Science, and Transportation, S. Rep. No. 92, 102d Cong., 1st Sess. (1991) at 3 ("Senate Report"); Report in Docket 89-600, 5 FCC Rcd 4962, 4966 (1990) ("6 Year Cable Report").

levels. It is this balance that the 1992 Cable Act seeks to strike.

8. Although the Commission has been provided a significant measure of flexibility in carrying out the tasks assigned it[9], the framework for cable rate-setting is set forth in the Act itself and further guided by the Cable Act's legislative history. The priority established in the Act is clearly to protect the interests of subscribers. An important focus for both basic tier and cable programming service rates, consistent with providing system operators a fair return, is the establishment of rate levels equivalent to rates that would be charged in the presence of effective competition.[10] The traditional utility process for deriving a reasonable rate, however, is not endorsed. Indeed, the Act continues to provide, as it has since 1984, that cable systems "shall not be subject to regulation as a common carrier or utility by reason of providing any cable service."[11] The traditional utility rate setting process is notoriously complex and burdensome to regulators and regulatees alike. Congress, however, desired that regulations governing cable rates be designed "to reduce the administrative burdens on subscribers, cable operators, franchising authorities, and the Commission."[12] Thus, to the extent feasible, the Act appears to contemplate a simplified form of regulation, using

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[9] See, e.g., Conference Report at 62 ("Rather than requiring the Commission to adopt a formula to set a maximum rate for basic cable service, the conferees agree to allow the Commission to adopt formulas or other mechanisms and procedures to carry out this purpose. The purpose of these changes is to give the Commission the authority to choose the best method of ensuring reasonable rates for the basic service tier and to encourage the Commission to simplify the regulatory process.")

[10] With respect to basic service tier rates, the law specifies that the Commission's regulations "shall be designed to achieve the goal of protecting subscribers of any cable system that is not subject to effective competition from rates for the basic service tier that exceed the rates that would be charged for the basic service tier if such cable system were subject to effective competition." Communications Act, § 623(b)(1), 47 U.S.C. § 543(b)(1). The criteria to be applied in setting both basic tier and cable programming service rates include a comparison with "the rates for cable systems, if any, that are subject to effective competition."

[11] Communications Act, § 621(c), 47 U.S.C. §541(c).

[12] Communications Act, § 623(b)(2)(A), 47 U.S.C. § 543(b)(2)(A).

"formulas or other mechanisms" where possible.[13] Finally, the legislative history makes it clear that the concern of the Act is with the exercise of market power by cable system operators, and is not with the returns earned by those entities supplying cable programming, a market in which there is abundant and increasing competition. Because cable operators bundle together transmission, equipment, and programming when selling cable service to subscribers, the need for broad oversight of cable rates was recognized. Nevertheless, the Senate Committee clearly indicated that it had "no desire to regulate programming." The House Committee recognized that programming costs were likely to change during the rate cycle and suggested that the Commission might develop "pass throughs" or other appropriate regulatory mechanisms to avoid unnecessary constraints on the cable programming market while protecting the interests of subscribers.

9. We have sought to establish in this Report and Order a comprehensive approach to cable rate regulation that achieves a reasonable balancing of statutory requirements and that will promote the broad policy objectives reflected in the statute. As required by the 1992 Cable Act, we provide for regulation of cable rates by local franchising authorities and the Commission pursuant to jurisdictional and procedural requirements that have been designed to reduce burdens on cable operators, local authorities, the Commission, and consumers. In addition, our requirements that will govern permitted rate levels for cable service and reflect a balancing of the interests of consumers and of cable operators. In this regard, we believe that our initial rate regulations should produce substantial savings to consumers on an aggregate industry basis. These savings will result from rate reductions required from a broad segment of regulated cable operators that service most of the nation's cable subscribers. We do not believe that the required rate reductions will hinder the ability of the cable industry to continue to provide quality services to consumers. On a going forward basis, we have implemented price caps for regulated cable systems that will reduce administrative burdens and permit the continued growth of services while effectively governing future rate levels.

10. We anticipate that the regulations we adopt today will change over time. In accordance with the statute, we will review and monitor the effect of our initial rate regulations on the cable industry and consumers, and refine and improve our rules as necessary. In addition, we will issue separately a Second Further Notice to obtain a better record for adoption of cost-of-service showings by cable operators seeking to raise

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[13] Communications Act, § 623(b)(2)(B), 47 U.S.C. § 543 (b)(2)(B).

rates above capped levels. This step is necessary to assure that our regulations governing such showings will correctly balance the interests of consumers in paying a fair rate and of cable operators in earning a reasonable profit.

11. The highlights of our decision today are set forth in an executive summary, attached as Appendix A. A list of commenting parties is set forth in Appendix B. Appendix C contains our new rate regulations, and Appendix D includes the new forms we are requiring cable systems, subscribers and local franchising authorities to use when following our rate regulations. Finally, an analysis of the survey of cable rates that we conducted in December 1992, which provided much of the factual basis for today's decision, is attached as Appendix E.

II. Report and Order

A. Rate Regulation of Cable Service

1. Rollback of Cable Service Rates

i. Background.

12. In the Notice, we cited Congress' findings in the 1992 Cable Act demonstrating that the average monthly cable rate since deregulation had grown almost three times as fast as the Consumer Price Index (CPI) since deregulation.[14] We sought comment on whether the Cable Act reflects a congressional intent that our regulations yield rates generally lower than those in effect when the Cable Act was enacted, or rather a congressional intent that our rules serve primarily as a check on prospective rate increases. We also solicited comment generally on the impact of rate reductions, or of limits on prospective rate increases, on the ability of cable operators to provide service to subscribers on the basic or higher level service tiers, and on cable operators' retiering discretion.

ii. Comments.

13. Municipalities uniformly argue that Congress envisioned that the Commission would order significant reductions in existing cable rates.[15] Municipalities maintain that the

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[14] Notice, 8 FCC Rcd at 511.

[15] See, e.g., Atlanta Reply Comments at 2; Austin Reply Comments at 3-4; Ayden Reply Comments at 2; Bayonne Reply Comments at 3-4; Boston Reply Comments at 5; Burnsville Comments at 1; CalCities Comments at 2; Cincinnati Comments at 2; Clinton Comments at 3; Dade Reply Comments at 2; Dearborn Reply Comments at 2; Fairborn Reply Comments at 2; Fairfax Reply Comments at 8-9; Fort

Cable Act and its legislative history reflect Congress' intent that the Commission ensure that current cable rates are reasonable.[16] Moreover, these parties contend that in order to effectuate Congress' intent, cable rates above those calculated to be reasonable under the Commission's rules must be lowered to comply with such guidelines.[17] GTE claims that at the very least, rates should be reduced for the approximately 28 percent of the nation's cable subscribers that Congress determined were subject to the most egregious rate increases.[18] In addition, municipalities state that congressional intent would be violated if the Commission limited regulation to prospective rate increases.[19] NCTA and cable operators, on the other hand, argue that rate increases enacted between 1984 and adoption of the 1992 Cable Act were lawfully taken under the authority of the 1984 Cable Act.[20] They contend that such rate increases reflect the increased services offered by cable operators since deregulation and that deregulation has made it possible for them to bring additional services to subscribers.[21] They argue that rate regulation could hinder or prevent the ability of cable operators to improve existing, and offer new, services and to invest in new

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Lauderdale Comments at 2; Garden City Comments at 2; Georgetown Reply Comments at 2; Greensboro Reply Comments at 2; Greenville Reply Comments at 2; Hastings Comments at 2; Hays Comments at 2; Henderson Reply Comments at 2; Indian River Comments at 2; Iowa City Reply Comments at 2; Junction City Comments at 2; Kinston Reply Comments at 2; Lake Forest Comments at 2; Lakeville Comments at 2; Laurens Reply Comments at 2; Laurinberg Reply Comments at 2; Liberal Comments at 2; Lincoln Park Comments at 2; Louisville Comments at 2; MACC Reply Comments at 2; Madison Comments at 2; Mankato Comments at 2; Marshall Comments at 2; Mentor Comments at 2; Miami Beach Comments at 4-5; Multnomah Comments at 2; NATOA Comments at 4-6; Niles Comments at 2; Oakland Comments at 1; Ottawa Comments at 1; Palm Desert Comments at 2; Phillipsburg Comments at 4; Piscataway Reply Comments at 2; Prince George Comments at 2; Ramsey Comments at 2; Reidsville Reply Comments at 2; Salina Comments at 2; San Antonio Reply Comments at 2; Tallahassee Reply Comments at 2; Titusville Reply Comments at 2.

[16] Id.

[17] Id.

[18] GTE Reply Comments at 10.

[19] Id. See also NAB Comments at 3.

[20] NCTA Reply Comments at 65-66.

[21] See AdelphiaII Comments At 2-3; Discovery Comments at 5-6; EET Comments at 1; ESPN Comments at 4-5.

technology that could benefit subscribers.[22] NCTA adds that a reduction in existing rates would be inconsistent with the Cable Act's purpose to restructure service offerings by cable operators within the bounds of rate constraints.[23]

iii. Discussion.

14. The explicit findings of the statute,[24] the overall scheme of regulation under the statute,[25] the fact that we must consider the rates of systems subject to effective competition in establishing regulations,[26] and the statutory goals articulated in the Act,[27] all persuade us that Congress was concerned that rates of systems not subject to effective competition reflect undue market power and are unreasonable to the extent they exceed competitive rate levels. In addition, we have conducted an industry survey to ascertain the differential

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[22] See AdelphiaII Comments at 2-3; NCTA Comments at 1-4; TIA Comments at 2.

[23] Id.

[24] The Cable Act of 1992 finds that for a variety of reasons, including local franchising requirements and the extraordinary expense of constructing competing cable systems, most cable television subscribers have no opportunity to select between competing cable systems. Pub. L. No. 102-385, Section 2(a)(2). The statute states that without the presence of another multichannel video programming distributor a cable system faces no local competition. The statute finds that the result is undue market power for the cable operator as compared to consumers and video programmers. Id. The statute additionally finds that the average monthly cable rate has increased almost 3 times as much as the Consumer Price Index since rate deregulation. Id.

[25] Under the Cable Act of 1992 only systems not subject to effective competition, as defined in the statute, are subject to rate regulation. See Communications Act, § 623(a)(2), 47 U.S.C. § 543(a)(2). Thus, the statute implicitly finds no need for regulation of rates of systems subject to effective competition because the presence of competition prevents them from exercising undue market power.

[26] Communications Act, § 623 (b)(2)(C)(i), 47 U.S.C. § 543 (b)(2)(C)(i).

[27] Under the statute, regulations governing rates for the basic service tier must additionally be designed to achieve the goal of protecting subscribers from paying rates that exceed the rates that would be charged if the system were subject to effective competition. See Cable Act of 1992, Section 2(b).

in rates between systems subject and those not subject to effective competition as defined in Section 623(l)(1) of the Cable Act.[28] As explained in greater detail below, our analysis reveals that rates of systems not subject to effective competition are, on average, approximately 10 percent higher than rates of comparable systems subject to effective competition. Thus, our survey supports the findings of Congress that current rates for cable systems not subject to effective competition reflect pervasive market power.[29]

15. We conclude, therefore, that our initial effort to regulate rates for cable service should provide for reductions from current rates of regulated cable systems with rates above competitive levels. Thus, our initial implementation of rate regulation of cable service will generally lead to significant reductions from current rate levels for most cable systems.[30]

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[28] See Order, 8 FCC Rcd 226 (1992). We explain in detail the methodology of this survey in Appendix E.

[29] As described below, to develop the initial rate standards, we have compared rates for cable systems in competitive markets with a random sample of noncompetitive systems using econometric analysis techniques. These analyses produced a consistent and statistically significant difference between the random sample data and the effective competition sample. The best estimate produced by these techniques is that rates for the competitive sample are 9.4 percent below the noncompetitive systems controlling for the effects of important system characteristics. Using this technique we have created a set of per channel "benchmark" rates. In addition, however, we are specifying that a system's rates (subject to certain adjustments) will be reduced no more than 10 percent below that specific system's rates as of the date of the survey. While the formula that produces the 9.4 percent differential is in our view the most accurate that we can develop given the data and time limitations involved, the statistical "confidence interval" of that estimate indicates that the actual difference between competitive and noncompetitive systems could be higher or lower. We have resolved the uncertainty here by limiting the reduction in rates to 10 percent while retaining the benchmark produced by the specific regression equation employed and by not requiring reductions below these benchmark levels. Although it embodies a number of compromises that are designed to account for the lack of precision in the data, this formulation taken as a whole is, we believe, responsive to the objectives of the Act.

[30] As noted above, cable systems that face effective competition in the local market are not subject to rate regulation. Our understanding, however, is that only a tiny percentage of the approximately 11,000 cable systems nationwide face effective competition, as that term is defined by the 1992 Cable Act. Thus,

Our approach will enable local franchise authorities to require rates for the basic service tier, and the Commission to require rates for cable programming services on the basis on individual complaints, to fall approximately 10 percent from September 30, 1992 levels, unless the operator can justify a higher rate based on costs. These reductions could be required of up to three-quarters of all regulated cable systems serving approximately three-quarters of the country's cable subscribers. As we explain below, rates of all regulated systems will then be subject to a price cap mechanism that will govern the extent to which rates can be raised on a going-forward basis without a cost-of-service showing. We will also examine systems with rates substantially above competitive levels to determine whether their higher rates are justified by higher costs. Finally, we will seek to refine our analysis through further industry surveys and order additional rate reductions if appropriate.

2. Standards and Procedures for Identification of Cable Systems Subject to Effective Competition

a. Application of Effective Competition Tests

i. Background

16. Under the 1992 Cable Act, if a cable system is not "subject to effective competition," the system's rates may be regulated. Cable programming service and equipment rates are regulated by the Commission pursuant to a statutory complaint process. Basic cable service and equipment rates are regulated by the local franchising authority or, under certain circumstances, by the Commission.[31] The Act states that "effective competition" is established if one of the three following tests is fulfilled:

> (A) fewer than 30 percent of the households in the franchise area subscribe to the cable service of a cable system;
> (B) the franchise area is (i) served by at least two unaffiliated multichannel video programming distributors each of which offers comparable programming to at least 50 percent of the households in the franchise area; and (ii) the number of households

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the vast majority of cable systems will be subject to rate regulation and may be required to reduce rates from existing levels.

[31] Communications Act, § 623(a)(2)(A), (B), 47 U.S.C. § 543(a)(2)(A), (B). By contrast, rates for premium programming services offered on a per-channel or per-program basis are not subject to rate regulation under any circumstances.

subscribing to programming services offered by multichannel video programming distributors other than the largest multichannel video programming distributor exceeds 15 percent of the house-holds in the franchise area; or

(C) the franchising authority itself is a multichannel video programming distributor and offers video programming to at least 50 percent of the house-holds in the franchise area.[32]

The Notice sought comment on various aspects of the Act's definition of effective competition.[33]

ii. Comments

17. There is a divergence of opinion among commenters regarding whether we should treat video dialtone service providers, leased access programmers, and traditional broadcasters offering multiplexed multichannel programming as multichannel video programming distributors in competition with cable operators. Many cable interests believe that all of these services should be considered in the effective competition determination,[34] while consumer groups, local franchising authorities, and NAB offer objections to inclusion of specific services.[35] These groups also disagree over when a competitor of cable should be deemed to "offer" video programming within the meaning of the second and third tests. The cable industry generally believes that programming should be deemed "offered" when a system is technically capable of providing service to households,[36] and the households can reasonably be assumed to be

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[32] Communications Act, § 623(l)(1), 47 U.S.C. § 543(l)(1).

[33] Notice, 8 FCC Rcd at 512-13.

[34] Cable operator may face competition from all these services: Continental Comments at 6-7; TCI Comments at 14-15; Comcast Comments at 12. Cable operator may face competition from video dialtone: Nashoba Comments at 5; Falcon Comments at 4; Lenfest Comments at 2; TimeWarner Comments at 8.

[35] Objection to inclusion of video dialtone service at present: MCATC Comments at 17; CFA Comments at 115-19; BellSouth Comments at 22-23; NYNEX Reply Comments at 14-15; USTA Reply Comments at 3. Objection to leased access users offering multichannel video programming: NMCC Comments at 6; Austin Comments at 17-8; NATOA Comments at 18; Sommerville Comments at 3. Exclusion of broadcasters offering multichannel video programming: NAB Comments at 13.

[36] TCI Reply Comments at 7; Comcast Comments at 11-12.

aware of the service because of some marketing effort by the distributor.[37] Local franchising authorities and consumer groups, on the other hand, argue that only active local marketing will ensure that households are fully aware they are being "offered" alternative video programming services.[38] These parties also take opposing positions on whether we should measure on an individual or cumulative basis the penetration level of competing alternative services, for purposes of meeting the 15 percent subscribership threshold in the second effective competition test. The cable industry and CFA believe the Act calls for aggregating the subscribership of all alternative services,[39] while local franchising authorities argue that at least one alternative service must have the subscribership of at least 15 percent of the franchise area in order to fulfill the test.[40] Finally, commenters diverge on whether the term "comparable" in the second test means any measurable penetration by alternative services, as argued by most cable companies,[41] comparable content and quality of programming provided by competing services, as suggested by some commenters,[42] or a comparable number of channels carried by the competing systems, as offered by NATOA.[43]

iii. Discussion

(1) First Effective Competition Standard

18. The first statutory test for effective competition is fulfilled when fewer than 30 percent of the households in the

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[37] TimeWarner Comments at 11.

[38] Bayonne Reply Comments at 5-6; NATOA Comments at 15.

[39] NCTA Reply Comments at 51-52; CIC Reply Comments at 31-5; Continental Comments at 7; Caribbean Comments at 2; Nashoba Comments at 9 n.19; TimeWarner Comments at 12; TCI Comments at 13; Comcast Comments at 12; Lenfest Comments at 2; Liberty Comments at 15; Falcon Comments at 6-7; CFA Comments at 114.

[40] NATOA Comments at 10; Miami Comments at 6; Boston Reply Comments at 7.

[41] TCI Comments at 15; Comcast Comments at 14; Continental Comments at 7; NCTA Reply Comments at 52-3; TimeWarner Reply Comments at 6.

[42] NYConsumer Comments at 5; Austin Comments at 19; NYNEX Reply Comments at 16; USTA Reply Comments at 3.

[43] NATOA Comments at 13-4.

franchise area subscribe to the cable service of a cable system.[44] The measurement of subscribership under this test will be based on the subscribership of the particular cable system in question, and not an aggregation of the subscriberships of all cable systems and competitors in the franchise area.[45]

(2) Multichannel Video Programming Distributor

19. The Notice sought comment on which service providers should qualify as "multichannel video programming distributors" ("multichannel distributors") for purposes of the second and third statutory tests for effective competition.[46] Section 602(12) of the Cable Act defines the term "multichannel video programming distributor" as a person such as, but not limited to, a cable operator, a multichannel multipoint distribution service, a direct broadcast satellite service, or a television receive-only satellite program distributor, who makes available for purchase, by subscribers or customers, multiple channels of video programming.[47] We construe this term according to the plain meaning of the statute as applying to entities that distribute, i.e., make available to customers or subscribers, more than one channel of video programming in a franchise area.[48] We now turn to application of this definition to the specific services cited in the Notice but not explicitly listed in Section 602(12).[49]

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[44] Communications Act, § 623(l)(1)(A), 47 U.S.C. § 543(l)(1)(A).

[45] For example, assume a franchise area where 60 percent of the households subscribe to System A, 5 percent subscribe to System B, 5 percent subscribe to System C, and 3 percent subscribe to System D. Assume also that neither System B, C or D reaches 50 percent of households in the franchise area. Only System A is subject to rate regulation under the 1992 Cable Act, pursuant to the first statutory test for effective competition. Systems B, C, and D are not subject to rate regulation because each of their individual subscribership rates is below 30 percent.

[46] Notice, 8 FCC Rcd at 512.

[47] Communications Act, § 602(12), 47 U.S.C. § 522(12).

[48] Id.

[49] An entity, however, must also meet the statutory tests for penetration in a franchise area, comparability of programming to that of cable companies, and availability of service within a franchise area, discussed in more detail below.

20. The Notice sought comment on whether telephone companies offering video dialtone service should be treated as competing multichannel distributors for purposes of the effective competition test.[50] Video dialtone will permit local telephone companies to make available to multiple service providers, on a nondiscriminatory basis, a basic common carrier "platform"[51] that can deliver video programming and other services to end users.[52] By definition, video dialtone has the potential to distribute more than one channel of video programming and consequently to qualify as a multichannel distributor under the Act.[53] We do not believe that the current constraints on telephone company entry into cable television preclude a telephone company from effectively competing with a cable system within the meaning of the 1992 Cable Act. It is true, as NYNEX and BellSouth observe, that telephone companies are generally prohibited under the Commission's cross-ownership rules from packaging and offering video programming directly to households,[54] but rather offer a

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[50] Notice, 8 FCC Rcd at 512.

[51] A "basic platform" is a common carriage transmission service coupled with the means by which consumers can access any and all video program providers making use of the platform. In the Matter of Telephone Company-Cable Television Cross-Ownership Rules, Section 63.45 - 63.58, Second Report and Order, Recommendation to Congress, And Second Further Notice of Proposed Rulemaking, ("Video Dialtone Order") 7 FCC Rcd 5781, 5783 n.3 (1992), recon. pending, petition for review docketed sub nom. Mankato Citizens Telephone Co. v. F.C.C., No. 92-1404 (D.C. Cir. filed Sept. 9, 1992).

[52] Id. at 5783.

[53] See generally Continental Comments at 6; Comcast Comments at 12; Nashoba Comments at 5 n.13; Falcon Comments at 4; Lenfest Comments at 2; TimeWarner Comments at 8.

[54] BellSouth Comments at 23; NYNEX Reply Comments at 15. BellSouth asserts that there are only two situations in which a telephone company providing video dialtone service could possibly qualify as a multichannel distributor: (1) where the company is providing multiple channel programming over a video dialtone facility directly to its rural area subscribers; and (2) where the company is providing video programming over a video dialtone facility to non-rural customers pursuant to a "good cause" waiver. Currently, the Cable Act does not prohibit a telephone company from providing video programming directly to subscribers in a rural area, or to other subscribers pursuant to a good cause waiver. See 47 C.F.R. §§ 63.56, 63.58, respectively. Comments at 23. See generally USTA Reply Comments at 3. We do not agree, however, that telephone companies may provide effective competition to cable operators in these circumstances alone, and instead take a broader

platform whereby multiple video programmers can offer such service pursuant to the Video Dialtone Order. However, the availability of the platform on a non-discriminatory basis to multiple video programmers could establish significant competition to existing cable operators even though the telephone company itself does not have direct control over programming as does a cable operator. Indeed, the availability of broadband transmission capacity to multiple video programmers could create greater competition than other potential multichannel providers of video programming. Accordingly, by providing the distribution system that makes video programming "available for purchase" by subscribers and customers, we conclude that video dialtone comes within the plain language of this section of the Act.[55]

21. Although video dialtone is a nascent service,[56] we believe, contrary to the concerns of some commenters,[57] that the Act's other requirements for effective competition regarding reach, penetration, and program comparability will ensure that in any given franchise area, a video dialtone service functions as an effective competitor. Thus, we believe that any video dialtone system that meets these additional statutory requirements can provide effective competition to a cable operator, with one exception. We agree with CFA that a joint venture between a telephone company and a cable system located in the same franchise area to offer video dialtone service cannot be considered effective competition to that incumbent cable system. We also agree with CFA that to permit such joint ventures to qualify would not advance the Act's goal of furthering the widest

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view of the competitive nature of non-cable, video dialtone services.

[55] Communications Act, § 602(12), 47 U.S.C. § 552(12). In light of the numerical, content-neutral test we adopt for comparability of programming, we do not believe, as NYNEX suggests, that telephone companies' common carrier status will prevent them from providing regulators with data necessary for an effective competition analysis. NYNEX Reply Comments at 15.

[56] At present, the Commission has granted one Section 214 application filed by a telephone company proposing to initiate a video dialtone system. See The Chesapeake and Potomac Telephone Company of Virginia, FCC 93-160 (released Mar. 25, 1993). Three other such applications are still pending: New York Telephone, FCC No. WPC-6836; New Jersey Bell Telephone, Florham, FCC No. WPC-6838; and New Jersey Bell Telephone, Dover, FCC No. WPC-6840.

[57] See generally MCATC Comments at 17; CFA Comments at 116.

possible diversity of information sources and services to the public.[58]

22. Multichannel video programming is often delivered to residents of multiple dwelling units via satellite master antenna television service ("SMATV"). A SMATV system generally receives satellite-transmitted signals at an earth station located atop a multiple unit building and distributes the signals through coaxial cables connecting the individual units of the building.[59] Typically, a SMATV provider will install a home satellite dish on the building and feed a package of multichannel video programming to the residents through the building's private cable distribution network. The provider will usually contract with a program-packaging service that deals with the various programmers to purchase the use of their material on a mass basis. Therefore, we agree with Falcon and others that the SMATV service operator functions much like a traditional cable operator and meets the general definition of multichannel distributor in Section 612(12).[60]

23. Some commenters argue that leased access providers offering compressed multiplexed multichannel video programming on a cable system should be treated as competing multichannel distributors under the Act.[61] TCI asserts that, by including television receive-only satellite programming distributors in the definition of a multichannel video programming distributor,[62] Congress showed that a distributor need not be facilities-based in order to come within the scope of the effective competition

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[58] CFA Comments at 117; Communications Act § 601(4), 47 U.S.C. § 521(4).

[59] See Definition of a Cable Television System, Report and Order, 5 FCC Rcd 7638, 7639 (1990), remanded on other grounds sub nom. Beach Communications, Inc. v. F.C.C., 959 F.2d 1103 (D.C. Cir 1992) (per curiam), cert. granted, 61 U.S.L.W. 3393 (U.S. Nov. 30, 1992) (No. 92-603) (argued Mar. 29, 1993).

[60] Falcon Comments at 3; TimeWarner Comments at 7 n.20 (citing H.R. Rep. No. 934, 98th Cong., 2d Sess. 22 (1984) (SMATV systems are potential competitors to cable systems); Nashoba Comments at 5 n.12; Liberty Comments at 17.

[61] Continental Comments at 7; Comcast Comments at 12; TCI Comments at 14-5.

[62] Often, a household wishing to receive video programming will purchase a television receive-only earth station, or home satellite dish, from a supplier, and then subscribe to a package of programming through either the dish supplier or some other program-packaging service.

test.[63] We agree with TCI that a qualifying distributor need not own its own basic transmission and distribution facilities. However, to qualify as an entity effectively competing with a cable operator, we believe that the facilities a multichannel distributor uses cannot be those of the operator.[64] Therefore, leased access providers will not be considered multichannel video programming distributors for purposes of meeting the statutory tests for effective competition.

24. Cable companies also argue that traditional broadcasters offering multiplexed multichannel video programming should qualify as competing multichannel distributors.[65] Under TCI's expansive approach, for example, any distributor offering multiple video programming choices to households should be considered a multichannel distributor under the Act. TCI states that with video-on-demand and digital compression technology, one standard 6 MHz broadcast channel will be sufficient to offer a wide array of programming, and thus provide competition to cable.[66] NAB, however, argues that broadcasters offering such programming should not fall within the effective competition tests because they typically offer only a few channels or choices of programming and thus cannot be expected to provide genuine competition to cable.[67] Furthermore, CFA argues that Congress, in passing the 1992 Cable Act, rejected the Commission's finding that six broadcast signals constituted effective competition to cable television.[68] Although we agree with CFA that traditional broadcast signals carrying one channel of programming in a 6 MHz

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[63] TCI Comments at 14, citing Communications Act, § 602(12), 47 U.S.C. § 522(12).

[64] Notice, 8 FCC Rcd at 512 n.15; see generally CFA Reply Comments at 65-6; NMCC Comments at 6; Austin Comments at 17-8; NATOA Comments at 18; Sommerville Comments at 3; see also NAB Comments at 9 n.9.

[65] Continental Comments at 6; see generally TCI Comments at 14-5.

[66] TCI Comments at 14.

[67] NAB Comments at 12-3.

[68] CFA Reply Comments at 65; see Reexamination of the Effective Competition Standard for the Regulation of Cable Television Basic Service Rates, Report and Order and Second Further Notice of Proposed Rulemaking, in MM Docket Nos. 90-4 and 94-1296, 6 FCC Rcd 4545 (increasing the signal standard from three to six broadcast signals); Communications Act, § 623(l)(1), 47 U.S.C. § 543(l)(1) (redefining effective competition without a broadcast signal standard).

band do not qualify under the effective competition test, we do not agree that technological advances may never make broadcasters effective competitors to cable within the meaning of the statute.[69] For example, should digital compression or other technology advance to the point that a single broadcaster in a community were able to offer programming comparable to that offered by a cable system,[70] such a broadcaster might well be deemed a multichannel video programming distributor effectively competing with the cable operator. However, the extent to which such multichannel video programming will be feasible as a technological and regulatory matter is still unclear.[71] We thus defer a ruling on whether a multiplexed broadcast signal can qualify a broadcaster as a multichannel video programming distributor until we can consider the question under more concrete circumstances.

25. Finally, some cable interests argue that future licensees in the proposed local multipoint distribution service ("LMDS"), while not specifically addressed in the Notice, should also be treated as multichannel video programming distributors under the statutory tests for effective competition to cable companies.[72] We have recognized that a likely initial use of LMDS will be to provide video services in competition with cable

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[69] Id.

[70] We define comparability of programming, infra Section II.A.2.a.(6), as the offering of at least 12 channels of video programming, at least one of which is nonbroadcast.

[71] For example, under current plans for a transition from conventional to advanced television (ATV) transmission, broadcasters will be required to broadcast only in ATV approximately 15 years after an ATV standard is selected. Advanced Television Systems and their Impact Upon the Existing Television Broadcast Service, 7 FCC Rcd 6924 (1992), recon. pending. It is not clear that, as a technical matter, more than one channel of ATV programming can be carried on a standard 6 MHz bandwidth.

[72] Falcon Comments at 3-4; TimeWarner Comments at 8 n.22. LMDS has been proposed by a group of inventors who have engineered a millimeter wave component technology which can be used to offer video and other communications services in the 27.5 - 29.5 GHz frequency range. Rulemaking to Amend Part 1 and Part 21 of the Commission's Rules to Redesignate the 27.5 - 29.5 GHz Frequency Band and to Establish Rules and Policies for Local Multipoint Distribution Service, Notice of Proposed Rulemaking, Order, Tentative Decision and Order on Reconsideration, 8 FCC Rcd 557 (1993).

television,[73] although point-to point and point-to-multipoint telecommunications services can also be offered. However, we have not yet begun to accept applications for this service, and we do not yet know the extent to which LMDS providers will choose to offer video programming as opposed to telecommunications services.[74] Thus, while it is still too early in the development of LMDS to reach firm conclusions on the treatment of LMDS providers as multichannel video programming distributors, we currently expect to analyze LMDS providers for purposes of the effective competition determination in a manner appropriate to the degree of video distribution services they provide.

(3) Availability of Competing Service

26. The second test under the Cable Act for finding effective competition to an incumbent cable operator is fulfilled, in part, if the franchise area is served by at least two unaffiliated multichannel distributors, each of which "offers" comparable video programming to at least 50 percent of the households in the franchise area.[75] The third test for effective competition is satisfied if the franchising authority itself is a competing multichannel distributor, and "offers" video programming to at least 50 percent of the households in the franchising area.[76] The Notice asked whether the proper standard for measuring when households are "offered" video programming by alternative systems should be when video service is actually available to households.[77]

27. Service of a multichannel video programming distributor will be deemed "offered" for purposes of the statutory effective competition tests when the service is both technically and actually available. Service will be deemed technically available when the multichannel video programming distributor is physically able to deliver service to a household

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[73] Id., 8 FCC Rcd at 559-60.

[74] There is one licensee operating such a service pursuant to a waiver of our rules. Hye Crest Management, Inc. operates a 50-channel system in Brighton Beach, New York City, from two transmitter sites. The Commission has authorized Hye Crest to provide service to the entire New York MSA. Hye Crest Management, Inc., 6 FCC Rcd 332 (1991).

[75] Communications Act, § 623(l)(1)(B), 47 U.S.C. § 543(l)(1)(B).

[76] Communications Act, § 623(l)(1)(C), 47 U.S.C. § 543(l)(1)(C).

[77] Notice, 8 FCC Rcd 512.

wishing to subscribe, with only minimal additional investment by the distributor, if necessary. Cole suggests, and we agree, that the nature of this additional investment should be controlling: if the additional investment is of a "community" nature, i.e. necessary to serve an entire neighborhood or community, then service will be deemed not technically available; by contrast, if the additional investment is of an "individual" nature, i.e. necessary to serve a single subscriber, then the service will be held technically available.[78] Thus, for example, the services of a cable operator will be deemed technically available to a household when the operator's system, namely its cable, "passes" the household. This interpretation comports with generally accepted industry standards for service availability.[79] We find that a cable drop to a household necessary for the subscriber to actually receive service is a minimal additional investment peculiar to an individual subscriber, the cable drop being equipment particular to that subscribing household. Therefore, the service would be technically available if the operator's cable passed a household, but a drop was not yet installed. On the other hand, if the operator must install cable trunk to reach the neighborhood in which a potential subscriber lives, this would constitute an investment common to a community. Service to the household would thus not be deemed technically available.

28. NATOA argues that the Commission should only consider service as "offered" if it is both technically available and the distributor of such service is actively marketing the service to the households on a local basis. NATOA believes that a distributor's service should not be deemed actually available unless potential subscribers are aware of its existence and availability.[80] NATOA would not endorse advertising or marketing only in national media outlets as adequate assurance that consumers have a genuine choice among services. TCI, in opposition, states that any sort of local, regional or even national marketing should be sufficient. For example, a national

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[78] Cole Comments at 4; see generally TCI Reply Comments at 6-7; TimeWarner Comments at 10-11; Falcon Comments at 6.

[79] The term "homes passed" means the number of homes a particular cable system has the technical ability to serve promptly if a potential customer orders service, and counts households even if individual cable drops are required.

[80] NATOA Comments at 15-16. For example, NATOA states that a direct broadcast service, which may be technically available to the entire country as soon as it launches operation, should not be considered actually available unless the direct broadcast service distributor is actively marketing the service through local means., Id. See also Fairfax Reply Comments at 9.

800 telephone number would suffice.[81] This approach, cable companies argue, would adequately assure that potential subscribers are reasonably aware of the availability of the services offered by alternative multichannel video programming distributors.[82]

29. We conclude that, contrary to arguments of some cable interests,[83] the service of the multichannel distributor must be more than technically available.[84] Rather, we reaffirm that service must be actually available, with no regulatory, technical or other impediments to households taking service.[85] We further find that for a service to be actually available, potential subscribers in the franchise area must reasonably be aware that the services of the multichannel video programming distributor can be purchased by them. However, we do not believe that such awareness necessarily depends on whether the marketing of the competitive service occurs on a local, as opposed to a national, level. Catalog companies, for example, make their services available to customers nationwide by means of 800 numbers. We see no reason to require needlessly fractionalized marketing in order to ensure that a national or regional

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[81] TCI Reply Comments at 7.

[82] Id. See also Falcon Comments at 6.

[83] TimeWarner Reply Comments at 3; TCI Reply Comments at 6-7.

[84] Austin argues that cable systems should have to compete head-to-head for subscribers, and not merely "pass" the same households for their service to be deemed "offered" to that subscriber. Austin states that in many communities, two cable operators may pass the same household, but only one is willing, able or authorized by the franchise agreement to serve the household. Austin Reply Comments at 66-67. As we discuss below, in such a case only one operator's service would be deemed "actually available" to subscribers because the other is precluded, either voluntarily or involuntarily, from offering its service to those subscribers.

[85] Comcast argues that a test based on actual availability is inconsistent with longstanding economic theory holding that competitive effects flow from both actual competitors in the market and those whose entry is sufficiently imminent to provide a competitive influence on the market even prior to actual entry. Comcast Comments at 11, citing U.S. v. Marine Bancorporation, 418 U.S. 602 (1974). However, we believe that potential availability is not sufficient to satisfy the statutory tests. Not only would this be a difficult standard to apply, it would not safeguard consumers' interests as strongly as actual competition.

programming service is available in a particular community.[86] Thus, potential subscribers may be made reasonably aware of the availability of a competing service, for example, through advertising in regional or local media, direct mail, or any other marketing outlet. We turn now to a discussion of how the technical and actual availability tests apply to various multichannel distributors.

30. First, service of an MMDS[87] system will be deemed technically available to a household when the MMDS system has its central transmitter in place and is physically able to offer and provide service to the household, either directly or indirectly.[88] The installation by the MMDS operator of a special

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[86] Falcon argues that deeming service "offered" based solely on when it is actually available to 50 percent of the households in a franchise area may induce some competitive services to refuse to offer service to portions of the franchise area in order to keep the incumbent operator subject to rate regulation. Falcon thus argues for a test based solely on the technical availability of the service. Falcon Comments at 6. However, in the absence of concrete instances of abuse of the effective competition test, such as Falcon describes, we decline to confine our definition to technical availability only. We believe that the requirement of actual availability ensures that subscribers have genuine competitive choices before rate regulation is discontinued. Moreover, it is not intuitively obvious that a competitor would deliberately keep its availability low, thus restraining its revenues, merely to keep an incumbent under rate regulation. To the extent that rate regulation results in lower prices, it might harm, rather than enhance, a competitor's marketing success with subscribers.

[87] MMDS is a service authorized by the Commission in the early 1980s. It provides line of sight microwave signals carrying video programming. Typically, the MMDS operator will install a VHF/UHF antenna, as well as special microwave equipment for reception by subscribers of the signals it provides. The signal from both antennas are typically directed through a single converter/tuner. This offers subscribers a simple-to-use format for the selection of over-the-air signals and the subscription microwave channels provided by the MMDS operator, similar to the home equipment format for cable service. Report and Order in Gen. Docket Nos. 90-54, 80-113, 5 FCC Rcd 6410, (1990).

[88] MMDS service to a household is usually provided directly via a line-of-sight signal transmission, but may also be achieved through the use of a signal booster for a household to which direct transmission is not possible because of obstacles such as buildings or trees. Commission rules provide for easy utilization of signal boosters, which are inexpensive, and such equipment will be

subscriber antenna capable of receiving microwave signals represents an "individual" additional investment by the operator, the antenna being particular to that household's reception of the service. Therefore, installation of a subscriber antenna is not necessary for MMDS service to be technically available. On the other hand, the MMDS operator's central transmitter must be in place in the franchise area and fully operational to satisfy this test.[89] Once an MMDS operator has initiated operation, the service will be deemed "offered" to those subscribers residing in the interference-free contour.[90] As noted above, those subscribers also must be reasonably aware that MMDS service is available to them.[91]

31. Video programming may also be received by households from a satellite via SMATV service[92] or television

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considered "individual additional investment" for these purposes, although a single device might serve several households, once in place.

[89] In order for an operator of MMDS service to locate his transmitter and begin service, the operator must receive authorization from the Commission and have obtained whatever local approvals, such as zoning permits, are required. Stations in the MMDS service are granted authorizations to operate pursuant to 47 C.F.R. §§ 21.900-914.

[90] The interference-free contour includes those areas to which the MMDS operator is capable of providing video programming free of interference. Wireless cable interests suggest measuring the "offering" of wireless cable systems according to Section 21.902(d) of the Commission's rules. Wireless Comments at 7-8. These rules define the protected service area of a wireless cable system, which is different from the "interference-free contour." Depending on the technical characteristics of the system, the technical availability of any given system may be more or less than this outer boundary. Thus, we will not employ the § 21.902(d) definition, as Wireless suggests.

[91] This may be accomplished by advertising or other marketing techniques analogous to those described for cable operators.

[92] Typically, the owner or manager of a multiple dwelling complex, such as an apartment building, condominium, or hotel, contracts for SMATV service with a dealer in cable television devices. The dealer acts much like a private cable company, with its activities ranging from placing a central antenna on the complex, to receiving retransmitted programming from a satellite and providing video programming to the individual households in the multiple dwelling complex.

receive-only earth stations ("TVRO").[93] As described above, SMATV service typically contemplates an owner or manager of a multiple unit building contracting with an off-premise operator who installs a home satellite dish atop the building and feeds a package of programming to the multiple unit residents through the private coaxial cable distribution network in the building.[94] Similarly, a household wishing to receive TVRO service must merely purchase a home satellite dish from a supplier. Programming to such SMATV/TVRO systems is most often supplied through an independent programming-packaging service that markets various packages of programming to SMATV operators, and the dish supplier or individual owners of TVROs,[95] and contracts with programmers for use of their material on a mass basis.[96] We find that multichannel video programming distribution service via such SMATV/TVRO service is technically available nationwide in all franchise areas that do not, by regulation, restrict the use of home satellite dishes.[97] All consumers need to do to receive the service is purchase such a dish or, for multiple dwelling units, arrange for SMATV service. We also find that, given the marketing efforts of SMATV/TVRO programming-packagers in areas where SMATV/TVRO systems are present, households nationwide should be reasonably aware that SMATV/TVRO service is available

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[93] Owners of home satellite dishes may apply for a license from the Commission in order to protect their reception from interference from terrestrial microwave stations sharing the same bandwidth. See 47 C.F.R. § 25.131(b).

[94] SMATV service is not explicitly regulated by the Commission. Part 15 of the Commission's rules sets general standards under which all operators of radio frequency devices may function.

[95] These program-packaging services generally advertise program-packages on an annual or monthly basis in trade magazines sent to individual owners of home satellite dishes or to the many dish suppliers that also enlist individual owners of home satellite dishes on behalf of the program-packaging services for a fee.

[96] See e.g., Cross, Private Cable Basics, Heifner Communications (describing to independent dealers how to enlist multiple dwelling buildings for SMATV service and receive authorizations for reception of satellite-delivered programming through services of Heifner Communications).

[97] Under extraordinary circumstances, service to TVROs may be unavailable: for example, where another licensed facility sharing the same bandwidth causes interference, and the conflict cannot be resolved by relocating the home satellite dish on the property; or where local zoning ordinances prohibit the installation of home satellite dishes. See 47 C.F.R. § 25.104.

in their community. Therefore, we will presume multichannel video programming via SMATV/TVRO services to be both technically and actually available in most franchise areas.

32. There also exists a number of emerging multichannel video programming distribution systems that may offer service competitive with that of cable television. These systems include, but are not limited to, direct broadcast systems ("DBS") and video dialtone systems. DBS systems[98] are expected to provide multichannel video programming as part of a service package consisting of the small, inexpensive antenna dish required for reception of the transmitted signals along with various video programming options.[99] Households may also require a converter box for reception. Currently, no "competitive" DBS system is operational.[100] Once a "competitive" DBS satellite system is launched, it will be deemed technically available to

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[98] Direct broadcast service is a radiocommunication service in which broadcast signals from earth may be retransmitted by high power, geostationary satellites for direct reception by small, inexpensive terminals. Occasionally, "DBS" is also used colloquially to refer to direct-to-home delivery of programming by TVRO systems using low-powered and medium-powered satellites in the C-band frequency bands and in portions of the Ku-band. Notice of Proposed Rulemaking, MM Docket 93-25, released March 2, 1993, (FCC 93-91), (DBS Notice) at paras. 3-4. That Notice refers to C-band services as home satellite dish or TVRO services, and we will use that definition in this discussion. In this Order, we use "DBS" providers to mean entities operating pursuant to Parts 25 or 100 of our Rules in the Ku-band. Id. at para. 5.

[99] See, e.g., Gregory, Hughes to Launch DBS Service in Early 1994, Private Cable, February 1993, at 8.

[100] A company called PrimeStar Partners currently operates a medium-power DBS service with seven superstations, three pay-per-view channels, and one foreign language channel (Japanese), for a total of eleven video programming channels. PrimeStar is owned by several cable MSOs, and its services are marketed by cable system operators, most typically in unwired areas within the operator's franchise area. Such an offering would not constitute a competitive service offering because it does not provide at least twelve channels of programming. See discussion of comparable programming, infra. One "competitive" high-powered DBS satellite, carrying at least three different program packages for three different companies totalling over 100 channels, is scheduled to launch within a year. DBS Notice, at para. 3 n.5. Several entities hold additional permits to build and launch high-powered DBS systems, with a cumulative potential for several hundred channels.

households in a franchise area, as NCTA suggests,[101] if its footprint covers those households, absent extraordinary circumstances. We agree, however, with DirecTV that a community must permit reception by satellite-receive only dishes, so that if a valid zoning ordinance prohibited such reception, a DBS service would not be technically available in that community.[102] Moreover, for DBS service to be actually available, households in a franchise area must be reasonably aware that the service is available in their area, and reception equipment and subscription service must be reasonably available in the area. As stated above and as NCTA argues, such awareness may be accomplished through any sort of local, regional or national media,[103] provided that such media reach the community in question.[104]

33. Video dialtone is yet another means of delivering multichannel video programming and other services offered through a telephone company's basic platform.[105] Video dialtone will be deemed offered to a franchise area when: a telephone company has a Section 214 authorization covering that area and has complied with necessary tariffing requirements; no significant further investment on the part of the telephone company is required for at least 50 percent of the subscribers in the franchise area to

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[101] NCTA Reply Comments at 54, citing Reexamination of the Effective Competition Standard for the Regulation of Cable Television Basic Service Rates, Report and Order and Second Further Notice of Proposed Rulemaking, 6 FCC Rcd 4545, 4554, n.52 (DBS will be considered to be available to the entire United States when any one DBS licensee begins operation). The footprint of a DBS satellite system is that area capable of receiving service once the satellite is launched and operational.

[102] DirecTV Comments at 2-3.

[103] NCTA Reply Comments at 54.

[104] NATOA Comments at 15-16. For example, we believe that regional or local marketing, such as by a national or regional 800 telephone number, would suffice.

[105] See generally Video Dialtone Order, supra, 7 FCC Rcd 5781 (1992). See also discussion, supra Section II.A.2.a.(2).

receive service;[106] and potential customers are reasonably aware of the availability of the service.[107]

(4) Definition of Household

34. Each of the three statutory tests for effective competition uses service to "households" in a given franchise area as one measure of that competition's presence.[108] As the Notice proposed and the comments support, each separately billed or billable customer will be counted as a "household" subscribing to or being offered video programming services.[109] We except, however, multiple dwelling units that are billed as a single customer. TimeWarner and others note that residents of multiple dwelling units often pay their landlord for cable service as part of their rent.[110] The cable operator's records thus reflect only the landlord as a subscriber. These commenters argue, and we agree, that failing to count the individual units in a multiple dwelling as separate households would yield an inaccurate picture of the level of competition in a franchise area. Therefore, for purposes of the statutory tests for effective competition, individual residences of multiple dwelling units will be treated as separate households subscribing to or being offered video programming services.[111]

(5) Measurement of Subscribership

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[106] Installation of any additional equipment at the individual's household necessary for the subscriber to receive service will constitute an additional investment of an individual nature, not affecting technical availability status.

[107] Marketing efforts in line with that described as sufficient for cable companies would suffice for these purposes.

[108] Communications Act, § 623(a)(2), 47 U.S.C. § 543(a)(2).

[109] Notice, 8 FCC Rcd at 512. See Falcon Comments at 5-6; Nashoba Comments at 8; TimeWarner Comments at 10; Armstrong Comments at 5; Intermedia Comments at 5; MCATC Comments at 18.

[110] TimeWarner Comments at 10; Falcon Comments at 5-6; Nashoba Comments at 8; Armstrong Comments at 5.

[111] NATOA argues that we should treat residents of multiple dwelling units as separate households only if their landlord provides them a choice among services. See NATOA Comments at 17 n.5. However, we agree with TCI that this is irrelevant because the multichannel distributors in the franchise area still compete for the multiple dwelling building owner's subscription. See TCI Reply Comments at 7-8.

35. The Notice sought comment on how to properly count the subscribership of multichannel video programming distributors in determining whether 15 percent of households in the franchise area subscribe to services other than the largest cable system.[112] Cable systems and CFA believe the Act calls for aggregating the subscribership of all alternative services when calculating the 15 percent threshold.[113] On the other hand, local franchising authorities assert that the Act mandates that at least one alternative service must have the subscribership of at least 15 percent of the households in the franchise area in order to fulfill the effective competition test.[114]

36. We conclude that the subscribership of alternative multichannel video programming distributors, for purposes of achieving the 15 percent threshold within the second effective competition test, should be determined on a cumulative basis. First, the Act states, in relevant part, that the second part of this test for effective competition is fulfilled if:

> ...the number of households subscribing to programming services by multichannel video programming distributors other than the largest multichannel video programming distributor exceeds 15 percent of the households in the franchise area....[115] (emphasis added)

Therefore, the plain language of the Act itself (using distributors in the plural) suggests that the number of households subscribing to competitive services is cumulative, taking into account those served by "multichannel video

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[112] Communications Act, § 623 (l)(1)(B)(ii), 47 U.S.C. §(l)(1)(B)(ii) ("the number of households subscribing to programming services offered by multichannel video programming distributors other than the largest multichannel video programming distributor exceeds 15 percent of the households in the franchise area..."); Notice, 8 FCC Rcd at 512-13.

[113] NCTA Reply Comments at 51-2; CIC Reply Comments at 31-5; Continental Comments at 7; Caribbean Comments at 2; Nashoba Comments at 9 n.19; TimeWarner Comments at 12; TCI Comments at 13; Comcast Comments at 12; Lenfest Comments at 2; Liberty Comments at 15; Falcon Comments at 6-7; CFA Comments at 114.

[114] NATOA Comments at 10; Miami Comments at 6; Boston Reply Comments at 7.

[115] Communications Act, § 623(l)(1)(B)(ii), 47 U.S.C. § 543(l)(1)(B)(ii).

programming distributors."[116] Second, we do not believe, as some parties claim, that aggregating the subscribership of the alternative services in a franchise area would result in a very low threshold that would allow cable operators to escape rate regulation before facing genuine competition from even one alternative system in the franchise area.[117] Rather, we agree with those that argue that a cable system experiences competitive pressures regardless of whether 15 percent of the households in the franchise area subscribe to many or only one single alternative service.[118] Moreover, we also adopt CFA's suggestion

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[116] See also Falcon Comments at 6-7. We also do not find the legislative history as clear as NATOA and other parties suggest. NATOA cites the Conference Committee Report, which states in relevant part: "effective competition means...the franchise areas (sic) is served by at least two unaffiliated multichannel video programming distributors offering comparable video programming to at least 50 percent of the households in the franchise area, and at least 15 percent of the households subscribe to the smaller of these two systems...." House Report at 62. NATOA also argues that the House Report implies that at least one alternative multichannel video programming distributor must be subscribed to by at least 15 percent of the households. The House Report states that effective competition means that "at least two sources of multichannel video programming are offered to 50% of households and subscribed to by at least 15 percent of households..." Committee Report at 89. See NATOA Comments at 10-11. The Conference Report reference to the 15 percent threshold is based on an assumption of only one other competing multichannel video programming distributor. The language of the House Report also makes a similar assumption. Neither report addresses the specific issue confronting us here: how to measure the subscribership if there is more than one competitive multichannel video programming distributor in the franchise area.

[117] See generally Dover Comments at 12-3; Miami Comments at 6.

[118] See generally TimeWarner Reply Comments at 4-5; CIC Reply Comments at 31-35. CIC also notes an anomaly that could result under the approach supported by local franchising authorities. Under this approach, a cable system would be free of rate regulation where one competitor had achieved 16 percent subscribership in the franchise area, but would remain subject to rate regulation where two competitors had both achieved 14 percent subscribership in the franchise area. Id.

We also observe that the cumulative measure we adopt is consistent with the approach under the Commission's prior rules regarding effective competition to cable television. Report and Order and Second Further Notice of Proposed Rulemaking in MM Docket Nos. 90-4, 84-1296, 6 FCC Rcd 4545, 4554 (1991)(measuring the

that only those multichannel video programming distributors that offer programming to at least 50 percent of the households in the franchise area should be included in this cumulative measurement.[119] In this way, we ensure that competitive service is a viable alternative in a significant portion of the franchise area when satisfying the effective competition test. This approach also will ensure that rate regulation can occur when there is "cream skimming," pursuant to which only select portions of a franchise area might receive a choice of several multichannel video programming distributors, while the remainder of the franchise area is left without such alternatives.[120]

(6) Program Comparability

37. The Notice tentatively concluded that we would establish a rebuttable presumption of "comparable video programming," under the second statutory test for effective competition, if a competitor offers multiple channels of programming and the numerical thresholds for the offering of and subscription to video services are met.[121] Some local franchising authorities, and some telephone companies, generally disagree with this "presumption" approach and instead favor a closer examination by the Commission of the quality of programming offered by the competing services.[122] They contend, for example, that for purposes of the effective competition analysis, the Commission should consider only those competing multichannel video programming distributors that provide programming of similar content or categories of content as the incumbent operator.[123] Commenters from the cable industry, on the other hand, generally support the "presumption" approach of the Notice. TCI and other cable interests argue that any

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penetration of alternative programming delivery systems by cumulating the subscribership of all available alternative services)). See also NCTA Reply Comments at 51-52.

[119] CFA cites Section 623(l)(B)(i) of the Communications Act, which states: "...Effective competition means that...the franchise area is...served by at least two unaffiliated multichannel video programming distributors each of which offers comparable video programming to at least 50 percent of the households in the franchise area..." (emphasis supplied). CFA Comments at 114.

[120] See generally CFA Comments at 115.

[121] Notice, 8 FCC Rcd at 513.

[122] NYConsumer Comments at 5; Austin Comments at 19; NYNEX Reply Comments at 16; USTA Reply Comments at 3.

[123] Rapids Comments at 11.

measurable penetration by a competing service represents acceptance of that service by consumers, and should be deemed comparable.[124]

38. We believe that the view suggested by the local franchising authorities -- that we require comparable content in categories of programming -- would place the Commission in the difficult position of comparing the quality and content of programming offered by the competing service.[125] However, upon further reflection, we do not believe that we can establish programming comparability, a separate requirement under the statute, by reference to the other tests for effective competition. Specifically, we believe that the 15 percent threshold for penetration by competing video programming providers, discussed supra, will reflect some measure of comparability as judged by consumers. However, to further ensure that competing services individually offer significant competition to the cable operator, we believe that such competitors must be able to offer an alternative number of channels in order to approach programming comparability.[126] Therefore, to offer "comparable" programming, multichannel video programming distributors must provide at least twelve channels of

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[124] TCI Comments at 15; Comcast Comments at 14; Continental Comments at 7; NCTA Reply Comments at 52-3; TimeWarner Reply Comments at 6.

[125] Cf. TCI Comments at 15 (approach other than the presumption based on availability and subscribership may wrongly place the Commission in position of judging program content); accord, Comcast Comments at 13-14; Adelphia I Reply Comments at 7.

[126] See Liberty Comments at 16-7. NATOA refines Liberty's numerical approach further, suggesting that only those multichannel video programming distributors that provide at least 80 percent of the number of channels provided by the incumbent operator should be considered in the determination of comparability of programming. NATOA Comments at 13-14.

Cole suggests that a presumption that competitors satisfying the availability and penetration tests also offer comparable programming should be defeated if the franchising authority could show that a given percentage of local households subscribing to competing alternative services still retained subscription to the incumbent operator. This, Cole argues, would indicate that the programming services are not truly comparable. Cole Comments at 7. We believe, however, that our more simplified approach will be easier to administer and to apply in the approximately 32,000 franchise areas subject to this test.

programming,[127] including at least one channel of nonbroadcast service programming.[128] Very few cable systems offer fewer than twelve channels.[129] We thus believe that this is the minimum number of channels which a competitor must offer to be found "comparable" in programming to an incumbent cable operator.[130] This definition of "comparability" should ensure alternate service is competitively comparable to a minimum basic tier service that an incumbent cable operator could offer.

b. Finding of Effective Competition

i. Background

39. Section 623(a)(2) requires the Commission to "find" that a cable system is not subject to effective competition before authorizing rate regulation. The Notice proposed to base the Commission's independent finding initially on the franchising authority's submission of its finding and the basis therefor. In the Notice, the Commission opined that given the large number of franchising areas nationwide and their varying competitive characteristics, local authorities may be in a better position to gather relevant facts and test operators' assertions concerning competition; relying on them in the first instance would permit a more accurate and expeditious initial effective competition analysis than the FCC could undertake without local assistance. Moreover, the Commission stated that since the Act makes the absence of effective competition a prerequisite to regulators' legal authority over basic cable rates, it would be reasonable to require local franchising

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[127] This total of twelve channels may include channels received via a VHF/UHF antenna, if the antenna is provided as part of the multichannel distributor's service package.

[128] In passing the 1992 Cable Act, Congress explicitly rejected the six signal standard used by the Commission when it redefined effective competition to cable systems. Communications Act, § 623(l)(1), 47 U.S.C. § 543(l)(1). We thus do not believe that a competitor carrying only broadcast signals should be deemed to offer programming comparable to that of an incumbent cable operator.

[129] Television and Cable Factbook, (Warren Publishing, Inc.), Volume No. 60, (1992), at G-65.

[130] With respect to switched networks, we construe comparability to mean at least twelve different programming sources.

authorities to provide evidence of the lack of effective competition as a threshold matter of jurisdiction.[131]

ii. Comments

40. Franchising authorities and consumer groups generally support creation of a presumption that a cable operator is not subject to effective competition, with the burden shifted to the cable operator to show otherwise.[132] Many of these parties agree that the Commission's finding should be based on the franchising authority's determination.[133] Some cable interests argue that only the Commission can make the finding,[134] but others are willing to allow the franchising authority to make the determination of no effective competition provided that the cable operator has an opportunity to challenge the determination before the franchising authority or the Commission.[135]

iii. Discussion

41. We are mindful of franchising authorities' concern that they do not have access to the information or the resources necessary to show the absence of effective competition as a threshold matter of jurisdiction.[136] Moreover, the language of

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[131] Notice, 8 FCC Rcd at 515. The Notice also sought comment on whether challenges to a determination of lack of effective competition should be made as part of a revocation proceeding under § 623(a)(5), as part of our normal procedures for reconsideration, or as part of any procedure we might adopt for evaluating oppositions prior to certification approval. Id. The procedure for challenging a finding of no effective competition will be discussed infra Section II.A.3.a.(2)(c).

[132] See, e.g., Austin Comments at 32; NATOA Comments at 23-25; Chandler Reply Comments at 2; Hays Reply Comments at 3; Watertown Reply Comments at 6.

[133] See, e.g., NMCC Comments at 6; NYNEX Comments at 14; New Jersey Comments at 25.

[134] Cox Comments at 57-58; see Cablevision Reply Comments at 37 (only Commission may make finding of absence of effective competition, but can be assisted by data provided by franchising authorities).

[135] See, e.g., Nashoba Comments at 42; NCTA Comments at 65-66; TCI Comments at 54.

[136] As NATOA noted in its comments, local authorities do not regulate DBS, MMDS, and SMATV, and therefore do not have access to information on the extent to which such systems compete with a

the Act requires the Commission to "find" that a cable system is not subject to effective competition, and makes the absence of effective competition a prerequisite to rate regulation.[137] However, given the sheer number of franchise areas, our procedures cannot rely on a thorough Commission analysis of effective competition for each franchise area in any timely fashion. Moreover, it is clear that Congress intended for us to adopt a simple, streamlined process for certification of local authorities,[138] and to expeditiously implement the rate regulation provisions of the Act.[139] Delaying certification of local franchising authorities until we make an affirmative finding in each case as to the presence or absence of effective competition would seriously undermine these objectives.

42. At the same time, we recognize that a cable operator has a statutory right to be free of rate regulation if effective competition exists and that the operator ought to have an opportunity to be heard on the issue of effective competition.[140] Accordingly, in order to balance these competing concerns, we adopt the following procedure: We will presume that the cable operator is not subject to effective competition. Franchising authorities can rely on this presumption when filing certifications with the Commission, unless they have actual knowledge to the contrary.[141] The cable operator will then have

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cable operator. While wireless systems may operate under a local business license, NATOA argues, a franchising authority may be able to impose only a fee and not reporting requirements. Further, NATOA contends that federal law restricts local authorities' right to regulate these systems to the same extent as cable operators, citing New York State Comm'n on Cable Television v. FCC, 749 F.2d 804 (1984).

[137] Communications Act, § 623(a)(2), 47 U.S.C. 543(a)(2). The House Report also states that the Committee intends "that the FCC, not the local franchise authority, determine whether a cable system is subject to effective competition." House Report at 80.

[138] See Conference Report at 62 ("FCC shall seek to reduce the administrative burdens on subscribers, cable operators, franchising authorities, and the Commission").

[139] Communications Act, § 623(l)(2)(b), 47 U.S.C. § 543(l)(2)(b).

[140] See Nashoba Comments at 42.

[141] In the next section, we will discuss the certification pleading cycle in greater detail. That pleading cycle will provide sufficient time for cable operators to rebut the presumption of effective competition before rate regulation takes effect.

the burden of rebutting this presumption with evidence of effective competition. This procedure, which we describe in more detail below, will ensure that rate regulation can be implemented as expeditiously as possible in areas where effective competition does not exist, that the administrative resources of this Commission and local franchising authorities are used as prudently as possible, that there is sufficient data upon which to base a meaningful decision, that cable operators' views on the presence or absence of effective competition can be heard, and that systems subject to effective competition are not subjected to rate regulation simply by operation of the presumption.

43. We believe that using a presumption of no effective competition is consistent with the 1992 Cable Act. As Congress recognized in crafting the Act, the vast majority of cable systems today are not subject to effective competition.[142] Moreover, such a presumption operates in our current regulations, adopted prior to the 1992 Cable Act, which place the burden on cable operators challenging a franchising authority's rate determination to demonstrate that they are not subject to effective competition.[143]

44. To address cable operators' concern that they do not have access to information necessary to mount a meaningful challenge to the presumption of no competition,[144] we will require competitors to respond within 15 days to requests from the cable operator for relevant information regarding reach and penetration if such information is not otherwise available.[145] We believe this requirement is necessary to achieve the goals of

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[142] See, e.g., Cable Act of 1992, § 2(a)(2), 47 U.S.C. § 547(a)(2); House Report at 29-30 ("[C]able's competitors serve, in the aggregate, fewer than 5 percent of American households.")

[143] See 47 C.F.R. § 76.33(a) and (a)(1) (presumption in proceeding challenging franchising authority determination is that effective competition does not exist; cable systems already regulated remain subject to regulation pending a demonstration of effective competition).

[144] See, e.g., NCTA Comments at 67.

[145] We also plan to initiate a rulemaking shortly proposing that competitors be required to file with the Commission annual registration statements containing these data. This should satisfy the concerns of numerous parties regarding the availability of data on cable competitors. See, e.g., Cox Comments at 60-61; TCI Comments at 11; NATOA Comments at 26 n.10; Wireless Comments at 9-10. Such a registration program also should eliminate the need for cable operators to query competitors about their penetration and reach as discussed in the text.

Section 623 by ensuring that the threshold effective competition determination is based on a complete record. We do not agree with Wireless[146] that requiring alternative distributors to respond to cable operators' requests for information will cause undue hardship to those distributors. Responses may be limited to the numerical totals needed to calculate the distributor's reach and penetration in the franchise area. Such information on its own service should be readily available to an alternative service provider. We will deal on a case-by-case basis with any abuses by cable operators of their right to request effective competition data from a competitor.

45. Contrary to Wireless's request,[147] alternative distributors will be required to supply the necessary information at their own expense, which we believe will be minimal. We see no need to limit the number of requests to which an alternative distributor should be required to respond, as Wireless suggests.[148] A number of cable systems may need the information from one national service, or a cable operator may reasonably believe that it has recently become subject to effective competition and should be entitled to the information necessary to seek revocation of certification, even if it requested the information previously.

46. We also believe that creating a presumption that effective competition does not exist, and placing the burden of proof on cable operators to rebut such a presumption, satisfies any potential due process concerns.[149] Cable operators are in a better position than franchising authorities or the FCC to ascertain their competitors' availability and subscribership, particularly in light of our requirement that competitors provide operators with such information. Moreover, as competitors, operators will be motivated to bring all competitive facts to light. Not only would the Commission be insurmountably burdened by having to gather such data in the first instance for franchise areas across the nation, but it is not locally positioned, as is the operator, to obtain the most precise data on competition in a given area. A finding of effective competition would serve the interests of the cable operators. We find it reasonable to place the burden on them, therefore, to rebut the presumption of no effective competition. As discussed below we will give operators an opportunity to challenge a finding of no effective competition prior to the imposition of rate regulation, by means of a

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[146] Wireless Comments at 10.

[147] Wireless Comments at 9-10.

[148] Wireless Comments at 9-10.

[149] See generally Mathews v. Eldridge, 424 U.S. 335 (1976).

petition for reconsideration of certification approval.[150] Any timely-filed petition for reconsideration raising a challenge to the finding that effective competition does not exist will automatically stay the franchising authority's certification pending our decision on the petition for reconsideration. However, should we ultimately confirm the lack of effective competition, the petitioning cable operator will be subject to refund liability calculated from the date its petition was filed. Moreover, to deter the filing of frivolous petitions for reconsideration, we will adopt a rule prohibiting such frivolous petitions (analogous to our rule against frivolous programming access complaints). This will permit us to issue forfeitures against cable operators who abuse the automatic stay provision.

47. Commenters agree with the tentative conclusion in the Notice that the determination of effective competition should be made on the basis of a franchise area.[151] Given the language of Section 623(l)(1), which expresses the tests for determining effective competition in terms of the "franchise area," we adopt this tentative conclusion.

48. Section 623(a)(2) prohibits rate regulation if a system is subject to effective competition. In order for any system to be subject to rate regulation, therefore, the system must be found not subject to effective competition. As proposed in the Notice and argued by NATOA, if more than one cable system is authorized to operate in a franchise area, separate effective competition determinations have to be made for each system.[152]

49. The Notice sought comment on whether a determination of effective competition for cable programming services subject to regulation by the Commission could be made on a system-wide, as opposed to franchise-area, basis. We suggested that such larger geographic units might be more appropriate for federal regulation and might harmonize with the uniform rate structure provisions of the Act.[153] Commenters who discussed this issue disagreed, arguing that this determination should also be made on a franchise-area basis. Upon consideration of these comments, we decline to adopt our original proposal. As NCTA

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[150] See infra Section II.A.3.a.(2)(c).

[151] 8 FCC Rcd at 515-16. See, e.g., CSC Comments at 25; Shaumburg Comments at 4; NYSCCT Comments at 15-16; NATOA Comments at 24 n.9.

[152] NATOA Comments at 24 n.9; Notice, 8 FCC Rcd 515-16.

[153] Notice, 8 FCC Rcd at 515-16. For a discussion of the Act's requirement of geographically uniform rates, see infra Section II.A.5.a.

suggests, regulation on a system-wide basis might have the effect of merging for regulatory purposes competitive and non-competitive franchise areas, thereby complicating rather than simplifying our administrative tasks.[154] Thus, the effective competition determination will be made on a franchise-area basis for cable programming service complaints as well as basic service regulation.

3. Regulation of the Basic Service Tier

a. Assertion of Jurisdiction over Basic Service and Equipment Rates

(1) Jurisdiction Over Basic Rate Regulation

50. The Cable Act of 1992 permits regulation of the rates for "basic cable service" only if effective competition does not exist. A franchising authority wishing to exert such regulatory jurisdiction must certify in writing to the Commission that: (1) the franchising authority will adopt and administer rules with respect to the rates subject to regulation that are consistent with the regulations prescribed by the Commission; (2) the franchising authority has the legal authority to adopt, and the personnel to administer, such regulations; and (3) procedural laws and rules governing rate regulation proceedings by such authority provide a reasonable opportunity for consideration of the views of interested parties.[155] Such a certification filed with this Commission by a franchising authority will become effective 30 days after filing unless the Commission finds, after notice and a reasonable opportunity for the authority to comment, that the franchising authority has not met one of the three criteria listed above.[156] If we disapprove the certification, the Commission must notify the franchise authority of any revisions or modifications necessary to obtain approval. Further, if we disapprove or revoke a certification, Section 623(a)(6) requires the Commission to exercise the franchise authority's regulatory jurisdiction until that authority becomes qualified by filing a new certification that meets the requirements set forth above. Such new certifications become effective upon approval by this Commission, which approval (or disapproval) must be issued within 90 days of filing.[157]

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[154] NCTA Comments at 66-67, n.65.

[155] Communications Act, § 623(a)(3), 47 U.S.C. § 543(a)(3).

[156] Communications Act, § 623(a)(4), 47 U.S.C. § 543(a)(4).

[157] Communications Act, §623(a)(6), 47 U.S.C. § 543(a)(6).

(a) Division of Jurisdiction Between FCC and Local Governments

i. Background

51. The Act states that rates for basic cable service "shall be subject to regulation by a franchising authority" or "by the Commission if the Commission exercises jurisdiction pursuant to paragraph (6)."[158] Paragraph (6) of Section 623(a) only permits the Commission to exercise "the franchising authority's regulatory jurisdiction" when a franchise authority's certification is disapproved or revoked, and then only until a new certification is approved. In the Notice, we observed that the scope of the Commission's authority to regulate directly basic cable service rates thus appears quite limited. We tentatively concluded that we can regulate basic cable service rates only if we have disallowed or revoked the franchise authority's certification. The Notice then reasoned that unless a franchising authority seeks to assert regulatory jurisdiction over basic cable service, the Commission would have no independent authority to initiate regulation of basic service rates. The Notice sought comment on this interpretation of the statute.[159] However, the Notice also sought comment on an alternative interpretation, based on the language of Section 623(b). That section mandates that we ensure by regulation that the rates for the basic tier are reasonable, and would provide broad authority for our regulation of basic service rates even where franchising authorities had not sought certification from the Commission.[160]

ii. Comments

52. Cable operators generally believe that the Commission can regulate basic service rates only if we have denied or revoked a franchising authority's certification.[161] They base their conclusion on the plain meaning of the statute and the legislative history and argue that Congress crafted the Act in such a way as to allow franchising authorities to decide not to regulate.[162] Franchising authorities and consumer groups

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[158] Communications Act, § 623 (a)(2), 47 U.S.C. § 543(a)(2).

[159] Notice, 8 FCC Rcd at 514.

[160] Notice, 8 FCC Rcd at 515.

[161] See, e.g., The Falcon Cable Group Comments at 14-15; Cox Comments at 54; NCTA Comments at 64; CATA Comments at 9-12.

[162] See, e.g., Nashoba Comments at 23-26; Cole Comments at 12-13.

disagree, generally arguing that the Act requires the Commission to ensure that rates for basic cable service are reasonable;[163] that the better interpretation of Section 623 is that Congress gave the Commission authority to regulate basic cable rates except where the franchising authority was certified to regulate;[164] and that any other interpretation would require the franchising authority to file, and the FCC to spend limited resources evaluating, "sham" certifications.[165]

iii. Discussion

53. After closely examining the legislative history of this provision and giving careful consideration to all the comments on this issue, we are modifying the tentative position we formulated in the Notice. Although a literal reading of Section 623(a) would limit our regulatory jurisdiction to instances where we have denied or revoked a franchising authority's certification, we do not believe that Congress intended to create a regulatory vacuum in all cases where a franchising authority was unable to obtain certification.[166] Section 623(b) gives us a broad mandate over basic service rates: "The Commission shall, by regulation, ensure that the rates for the basic service tier are reasonable." As the Conference Report states, the goal of this Section "is to protect subscribers of any cable system that is not subject to effective competition

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[163] See, e.g., Municipal Comments at 8.

[164] See NATOA Comments at 19.

[165] See Municipal Comments at 11-12. By filing a knowingly inadequate certification, which would be denied, an authority could ensure FCC regulation of rates under the narrower interpretation proposed in the Notice.

[166] Although the House Report states that Section 623(a)(6) was intended to "specif[y] the scope of the FCC's authority to regulate rates in lieu of a franchising authority," House Report at 81, Section 623(a)(6) specifically refers to our assumption of jurisdiction in cases of denial or revocation and is silent regarding our authority in cases where a franchising authority does not seek certification.

SBA urges us not to regulate in cases where a franchising authority fails to seek certification, arguing that this will lessen burdens on small operators. As stated in the text, we will not, for the time being, regulate basic rates where a local government elects not to seek certification out of a belief that rates in its community are reasonable. We also are taking steps to lessen the burdens of rate regulation on small operators, see infra section II.A.5.f.

from rates that exceed the rates that would be charged if such a system were subject to effective competition."[167] Based on the broad language of Section 623(b), and the fundamental goal of the rate regulation provisions to protect subscribers from excessive rates, we conclude that our jurisdiction over basic rates is not limited to those instances when a franchising authority's certification has been denied or revoked.

54. While we are mindful of the responsibility which the Act places on us, we believe that in order to carry out this obligation, we must coordinate and cooperate with local franchising authorities. Local franchising authorities are envisioned as the primary regulators of basic service rates under the Act's framework. We do not, therefore, assume jurisdiction at this time in all cases where a franchising authority does not apply for certification. We are particularly reluctant to override a locality's decision not to regulate rates. Under the interpretation urged upon us by certain commenters, the Commission would have to regulate even if the franchising authority opposes rate regulation. This would lead to potential local/federal conflicts, and seems counter to Congress' desire to vest in local franchising authorities the primary authority to regulate basic rates.

55. We are concerned, however, about situations where a franchising authority chooses not to file a certification because it knows that it cannot meet certification standards,[168] particularly when it does not have the resources to administer rate regulation or the legal authority to act, but nevertheless believes that rates should be regulated. However, in providing that franchising authorities lacking the resources to regulate can affirmatively request FCC regulation of basic cable rates, we will presume that franchising authorities receiving franchise fees have the resources to regulate. Any such franchising authority seeking to have the Commission exercise jurisdiction over basic rates will be required to rebut this presumption with evidence showing why the proceeds of the franchise fees it obtains cannot be used to cover the cost of rate regulation.[169]

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[167] Conference Report at 62.

[168] Consistent with the statutory language, if such a franchising authority files a certification that is denied or revoked, we will regulate the basic service rates of the cable system if it is not subject to effective competition until the franchising authority cures the certification defect.

[169] We previously required an analogous showing by a franchising authority to justify charging a franchise fee in excess of three percent. The franchising authority was required to show, inter alia, that the increase would be necessary to further the

The franchising authority must present to the Commission a detailed explanation of its regulatory program. This showing should demonstrate that its franchise fees are insufficient to fund the additional activities required to administer basic rate regulation. If the Commission determines that the franchise fees cannot reasonably be expected to cover the present regulatory program, as well as basic rate regulation, it will assume jurisdiction.

56. Similarly, where a local franchising authority notifies us that it lacks the legal authority to regulate basic service rates, we will assume jurisdiction until the local government secures such authority. Local governments requesting us to assume jurisdiction on this ground should submit with their request a statement detailing the nature of the legal infirmity. If an otherwise qualified franchising authority does not meet the other certification requirements, i.e. that its rate regulation rules are not yet consistent with ours (Section 623(a)(3)(A)), or its procedural regulations do not provide interested parties an opportunity to comment (Section 623(a)(3)(C)), we will automatically assume jurisdiction in the former case we will permit the authority an opportunity to cure the defect before assuming jurisdiction in the later case. See infra Section II.A.3.a(2)(d). We presume that otherwise qualified authorities will readily be able to do so, but, as required by Section 623(a)(6), we will assume jurisdiction until the franchising authority cures the defect.

(b) Preemption Issues

i. Background

57. Section 623(a)(3)(B) of the Communications Act, as amended, requires that a franchising authority be able legally to adopt regulations consistent with those we establish for basic cable rate regulation. The Notice sought comment on whether a

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franchise authority's planned local regulatory programs. 47 C.F.R. Section 76.31(a), 76.31(b) (1984). Application of Total Communications of Irving, Inc., FCC 74-157, 45 FCC 2d 525 (1974) (purpose of the showing required by Section 76.31(b) was to allow the Commission to obtain specific information on how a franchise fee would be expended on a proposed local regulatory program); General Television of Minnesota, Inc., FCC 74-578, 47 FCC 2d 60 (1974) (franchise authority sufficiently showed the excess fee to be reasonable, in light of the community's extensive supervisory program, setting forth substantive details on its local Cable Television Commission, the yearly operational budget for the local cable commission, including an itemized list of operational expenses, as well as a ten-year projection of its gross subscriber revenues and resultant franchise fee payments).

franchise agreement barring rate regulation would prevent a franchising authority from certifying that it had the "legal authority" to regulate rates. The Notice also sought comment on whether franchising authorities derive their powers to regulate from state and local law alone, or whether the Cable Act may itself be an independent source of authority to regulate rates. If the Cable Act empowers franchise authorities to engage in rate regulation regardless of state law or franchise agreements, the Notice questioned what Congress intended by enacting Section 623(a)(3)(B). The Notice also sought comment on whether the Commission's exercise of basic service rate regulation authority pursuant to Section 623(a)(6) in a state prohibiting rate regulation would in fact constitute preemption of state law, and if so, whether the Commission could confer this power to regulate basic service rates on franchising authorities where they otherwise would be without such power.[170]

ii. Comments

58. Many municipal and state governments, NATOA, and CFA argue that the Act provides an independent source of authority for municipalities to regulate rates.[171] CFA, for example, argues that the language of Section 623(b), which provides that "[t]he Commission shall, by regulation, ensure that the rates for the basic tier are reasonable" is preemptive in nature and evinces congressional intent that basic cable service be regulated where no effective competition exists.[172] NATOA argues that Section 623 "represents a comprehensive effort by Congress to regulate cable rates and demonstrates a clear intent to preempt incompatible state law, thus making an explicit statement of preemption unnecessary."[173]

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[170] Notice, 8 FCC Rcd at 516.

[171] See, e.g., Dade Comments at 6; Dover Comments at 7; Baltimore Comments at 3; NATOA Comments at 28-29; CFA Comments at 127-129.

[172] CFA Comments at 127-130.

[173] NATOA Comments at 28-29, citing New Mexico v. Mescalero Apache Tribe, 462 U.S. 324, 334 (1983). NATOA's reliance on this case is misplaced. The issue in New Mexico was whether New Mexico's laws could be applied to on-reservation hunting and fishing by nonmembers of the Apache Tribe, or whether such application was preempted by federal law. In discussing its prior line of cases concerning tribal and state authority over Indian reservations, the Court discussed the "special sense in which the doctrine of pre-emption is applied in this context. [Citations omitted.] Although a State will certainly be without jurisdiction if its authority is pre-empted under familiar principles of pre-

59. Cable operators contend that the Act provides no independent authority for a state or a franchising authority to regulate if state law or franchise agreements bar rate regulation.[174] TCI argues that if the Act confers independent legal authority, then Sections 623(a)(3)(B) and (a)(4)(B) are meaningless.[175] TimeWarner contends that only the states can bestow regulatory authority on cities; the federal government cannot provide the cities what the state has chosen to withhold. Further, TimeWarner argues that the plain language of the Act is clear: a franchising authority must have the legal authority to regulate.[176]

iii. Discussion

AA. Preemption of Franchise Agreements

60. Cable operators argue that under state contract law, a franchising agreement prohibiting rate regulation, or that is silent on the issue, renders the franchising authority without "legal authority" to regulate rates as a matter of contract law.[177] We disagree. Section 623(a) was taken from the House bill, and the House Report states the following:

> The Commission shall not establish as a condition of certification that the franchise agreement between a franchising authority and cable operator include a provision allowing the franchising authority to regulate the cable operator's rates. ... The Committee intends that, as a matter of federal law,

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emption, we cautioned that our prior cases did not limit pre-emption of state laws affecting Indian tribes to only those circumstances." Id. at 333-34. The Court then indicated that in the tribal context, the cases have rejected "a narrow focus on congressional intent to pre-empt state law as the sole touchstone" and have rejected the proposition that an express congressional statement is required. Rather, in this context the Court finds preemption unless the state interests are sufficient to justify assertion of state authority. Id. at 334.

[174] See, e.g., The Falcon Cable Group Comments at 15-16; Continental Comments at 16; NCTA at 69; TimeWarner at 26-28.

[175] TCI Comments at 46.

[176] TimeWarner Comments at 26-28.

[177] See, e.g., Continental Comments at 16-18; TCI Comments at 44.

> except as provided in Subsection 3(j) all franchising authorities, regardless of the provisions in a franchise agreement, shall have the right to regulate basic cable service rates if they meet the conditions in section 623(a)(4).[178]

61. The House Report language is strong authority for preemption of franchise agreements barring rate regulation. Moreover, Congress expressly grandfathered specific types of rate regulation agreements in Section 623(j);[179] had it intended that all such agreements would continue in force and effect, Section 623(j) would be superfluous. Given the fundamental rule of statutory construction that effect should be given to legislative clauses if possible,[180] and the House Committee's explicit direction, we find that all provisions in franchising agreements barring rate regulation by franchise authorities are preempted by federal law. We note in this regard that, given the much more inclusive standard used for effective competition under our previous regulations and the 1984 Cable Act's ban on rate regulation unless that standard was met, it is unlikely that many franchising authorities would have negotiated for rate regulation authority in their agreements. To read the Act as permitting the rate regulation restrictions of existing franchise agreements to govern, despite the major change made in the 1992 Act's definition of effective competition, would nullify its effect in many cases, and frustrate its purpose of ensuring that consumers pay reasonable cable rates.

BB. Preemption of State Law

62. The second preemption issue raised in the Notice is whether a franchising authority in a state that bars rate regulation at the state or local level would have the "legal authority" necessary to be certified to regulate basic cable rates. There are two types of state statutory schemes potentially at issue. The first arises where rate regulation is barred at the state level, i.e. where neither the state nor the locality may regulate rates. The second arises where the state retains rate regulatory authority at the state level but provides localities the legal authority to enter into franchise agreements. We will discuss each of these issues in turn.

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[178] House Report at 81 (emphasis supplied).

[179] Section 623(j) of the Communications Act grandfathers rate regulation agreements made before July 1, 1990, where there was no effective competition under Commission rules in effect on that date.

[180] See Sutherland Statutory Construction, § 46.06.

(i) Rate Regulation Barred at the State Level

63. It appears that the first question is largely theoretical, since the record does not reveal any instances in which state law currently forbids state and local governments from engaging in cable rate regulation. Nonetheless, because this issue may arise in the future, we will resolve it here.

64. Cable operators argue that state laws barring rate regulation are not preempted; otherwise, they assert, Section 623(a)(3) is meaningless. If the Act were an independent source of authority to regulate rates, they reason, every franchising authority would have "legal authority" and there would be no need for this certification standard.[181] Franchising authorities vigorously dispute the cable industry's statutory analysis, arguing that in order to achieve the congressional objective of ensuring reasonable rates, the FCC should interpret the Act as an independent source of authority for franchising authorities to regulate rates.[182]

65. An examination of the statutory scheme persuades us that Congress did not intend to preempt state laws barring rate regulation by state or local authorities. We first look to the language of the statute. As TCI and others suggest, in interpreting a statute we should attempt to give each clause and word meaning, if possible.[183] We believe that Section 623(a)(3) must be interpreted to require that a franchising authority be the body under state and local law authorized to regulate cable rates.[184] If the Act were an independent source of authority for franchising authorities to regulate rates, there would be no need

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[181] See, e.g., TimeWarner Comments at 27; TCI Comments at 46.

[182] See, e.g., New Bedford Comments at 4; Sommerville Comments at 4; Dade Comments at 6.

[183] See n. 180, supra.

[184] NATOA attempts to import another meaning into Section 623's requirement of legal authority; it argues that by this provision, Congress intended to ensure that the governmental entity filing the certification is the authority authorized to regulate the cable system in that franchise area. NATOA Reply Comments at 26-27. This is certainly part of the provision's meaning, but neither the legislative history nor the statutory scheme support such a limited reading of the requirement of legal authority.

for franchising authorities to certify as to their legal authority.[185]

66. The bifurcated regulatory regime created by the statute supports the view that state law barring rate regulation by state or local authorities is not preempted. Franchising authorities could seek certification to regulate basic cable rates; if the certification were disapproved or revoked because the franchising authority lacked the requisite legal authority, the Commission would regulate those rates until the franchising authority could be certified.[186] Since state laws barring rate regulation thus are not inconsistent with the federal statutory scheme, we conclude that the provision of the Communications Act that preempts state and local laws and provisions in franchise agreements that conflict with the Communications Act,[187] does not preempt such state laws.

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[185] See, e.g., Cablevision Reply Comments at 45; Cole Reply Comments at 11-12.

[186] The Notice also asked whether FCC regulation of basic cable rates in a state that barred rate regulation would in fact constitute preemption of state law. Notice, 8 FCC Rcd at 516. To the extent the state law bars only state and local rate regulation, FCC regulation in that situation would not constitute preemption because it would be pursuant to federal, not state or local law. Moreover, since the Commission has authority to regulate in states that bar rate regulation, there is no conflict between such a state law and the federal regulatory system and the state law does not impose an obstacle to the effectiveness of the federal statute. See Head v. New Mexico Board, 374 U.S. 424, 432 (1962) (holding that New Mexico statute barring optometry advertisements not preempted by Communications Act). Of course, in the unlikely event that the state law purports to prohibit federal--as opposed to just state or local--regulation, the state law would stand as an obstacle to the accomplishment of the full purposes and objectives of Congress to protect consumers from unreasonable rates. In those circumstances, the state law must give way to federal law under established preemption principles. See Hines v. Davidowitz, 312 U.S. 52, 67 (1941).

The Notice also questioned whether, if state law were preempted, the FCC could extend to franchising authorities the authority to regulate rates where they otherwise would be without such power. In the absence of Congress' express authorization to so empower the states, we have no power to do so. Planned Parenthood Fed. of America v. Heckler, 712 F.2d 650 (1983).

[187] Communications Act, § 636(c), 47 U.S.C. § 556(c).

67. Our conclusion is consistent with Supreme Court precedent on preemption. The main issue as to whether Congress and its agencies can exercise exclusive jurisdiction over state laws rests on the question of whether Congress has in fact intended to make its jurisdiction exclusive.[188] The Supreme Court has upheld state law in areas not inherently requiring national uniformity, unless there is found "such actual conflict between the two schemes of regulation that both cannot stand in the same area, [or] evidence of a congressional design to preempt the field."[189] Therefore, absent any evidence of legislative intent to preempt state law, the Court has not allowed federal law to prevail over areas of local concern and requiring the attention of the state.[190] On the other hand, if Congress has created regulations about matters of national concern, and state law is frustrating the very purpose of the congressional objectives in a specific area of law, federal law will preempt state law to render effect to the particular Federal Act.[191] As discussed above, because a state law barring rate regulation does not prevent the Commission from regulating rates, such a law is not inconsistent with the federal statutory scheme set forth in the 1992 Cable Act.

68. Finally, we note that cable operators urge an interpretation of the Act that would prevent Commission regulation of basic cable rates in states that bar rate regulation.[192] They base this argument on Section 623(a)(6), which provides that if the Commission disapproves or revokes a franchising authority's certification, the Commission shall exercise "the franchising authority's regulatory jurisdiction" ... until the franchising authority has qualified by filing a new certification that meets the Act's requirements. This language, the commenters contend, requires the Commission to "step into the shoes" of the franchising authority and limits the Commission's jurisdiction to whatever power the franchising authority has under state law. If the state bars rate regulation, these commenters conclude, the Commission cannot regulate rates. Commenters thus urge us to limit the exercise of our regulatory

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[188] Head, supra, 374 U.S. at 430.

[189] Head, supra, 374 U.S. at 430.

[190] Head, supra, 374 U.S. at 432; De Canas v. Bica, 424 U.S. 351, 357 (1976).

[191] Hines v. Davidowitz, supra, 312 U.S. at 66, 67 n.20 (for example, in Hines, federal law preempted state law in an effort to further the comprehensive federal schemes of the immigration and naturalization laws).

[192] See, e.g., TCI Reply Comments at 57.

authority only to those jurisdictions where the franchising authority has the legal authority to regulate rates.[193] We find this argument without merit. As discussed above, the Congress provided for FCC regulation of rates when a franchising authority could not meet the certification standards set forth in the Act, one of which requires the franchising authority to have the requisite legal authority. This provision would have little meaning if the Commission could not regulate in states that bar rate regulation. The better interpretation of this provision is that Congress intended the Commission to exercise what would otherwise be the franchising authority's regulatory jurisdiction until the franchising authority has qualified to exercise such jurisdiction (e.g., by having the impediment to its legal authority removed).[194]

(ii) Rate Regulation Authority Exercised at State Level

69. The second preemption issue raised by the commenters concerns state laws that prohibit local franchising authorities, but not state government entities, from regulating rates. We believe that, for the same reasons discussed in the preceding section, such state laws are not preempted by the 1992 Cable Act. These laws do not prevent state regulation of cable rates; rather, they simply define which governmental entity in the state is empowered to regulate rates. Since local franchising authorities receive their power to grant franchises and regulate rates from the state, there is no reason why the state cannot retain that power and exercise it at the state level. Thus, although local governments may be barred by state law from regulating rates, the state itself may engage in such activities. In these instances, the state would file a certification with the Commission as the franchising authority.

70. The application of these principles is illustrated by the regulatory scheme constructed by the Commonwealth of Massachusetts. In this regard, the Massachusetts Community Antenna Television Commission ("MCATC") requests clarification of

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[193] See, e.g., Nashoba Comments at 30-31; TCI Comments at 44-45.

[194] Cable operators also argue that Congress did not intend for the Commission to exercise jurisdiction for a franchising authority in perpetuity, and that Congress intended the Commission only to regulate a franchising authority's rates until that authority could be certified. See Cole Comments at 12-13; TCI Reply Comments at 57. However, we find no indication in the Act or its legislative history that Congress intended to limit the exercise of our jurisdiction to a certain time frame.

its role and the role of localities in regulating basic cable service.[195] Under Massachusetts law, local governments issue franchises.[196] They thus arguably would be considered "franchising authorities" under the Act's definition.[197] The right to regulate rates, however, is explicitly given under state law to MCATC.[198] Therefore, under the Cable Act, franchising authorities in Massachusetts would be unable to certify that they have the "legal authority" to regulate rates; yet, MCATC is concerned that under a narrow reading of the Act's definition, it would not be a "franchising authority" authorized by the Act to regulate rates.

71. We conclude that, under principles of municipal corporation law, MCATC can be considered a "franchising authority," which the Act defines as "any governmental entity empowered by Federal, State, or local law to grant a franchise." The power of a local government to grant franchises must be expressly granted or necessarily implied from an express grant of power.[199] Local governments have no inherent regulatory power.[200] That Massachusetts chose to delegate its franchising powers to municipalities does not mean that it gave up its power to grant franchises. Moreover, we must bear in mind that Congress certainly did not intend for "regulatory gridlock" to occur as a result of a state's statutory structure. We thus clarify that "franchising authority" means, for rate regulation purposes, the authority empowered by state law to regulate rates. In Massachusetts' case, this entity is MCATC, even though it has delegated its authority to issue franchises to local governments. Massachusetts may, of course, delegate its rate regulating power to localities should it choose to amend its statutory scheme.

(2) The Certification Process

(a) The Certification Form

i. Background

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[195] See MCATC Comments at 4-6.

[196] M.G.L. Ch. 166A, § 3.

[197] Communications Act, 47 U.S.C. § 522(9).

[198] M.G.L. Ch. 166A, § 15.

[199] See Antieau, Municipal Corporation Law, § 29.02.

[200] See Ferris, Lloyd, Casey, Cable Television Law, ¶ 13.14[1].

72. The Notice proposed that a franchise authority intending to regulate basic cable rates be required to submit a certification meeting the requirements of Section 623(a)(3)(A-C), discussed above, and also stating the basis for its finding that its franchisee is not subject to effective competition. The Notice sought comment on the tentative conclusion that a standardized, simple form could be used for certifying to the three criteria of Section 623(a)(3), and that the form should include a section for the authority's explanation of its finding that effective competition is lacking, with reference to documentable data.[201]

ii. Comments

73. Most franchising authorities agree that a standardized, simple form, similar to the form contained in Appendix D of the Notice, is sufficient and desirable.[202] TCI and Cole agree that the form should be kept simple but also propose that it include a representation that the franchising authority has provided the cable operator notice of its intent to seek certification.[203] Other cable interests argue that the form should require the franchising authority to provide evidence of the absence of effective competition and show how it meets the three criteria of Section 623(a)(3).[204]

iii. Discussion

74. Given our decisions regarding how effective competition determinations can be made and on the certification pleading cycle, there is no need to require franchising authorities to submit detailed information regarding effective competition on the certification form. Cable operators will have a reasonable opportunity to challenge certifications on effective competition and other grounds before rate regulation actually begins. Therefore, we adopt the form included in Appendix D to the Notice with one change, suggested by NATOA, which incorporates the decision we have made regarding the presumption

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[201] Notice, 8 FCC Rcd at 516.

[202] See, e.g., Austin Comments at 28; Kansas Comments at 1; Cal Cities Comments at 7.

[203] TCI Comments at 54; Cole Comments at 15. The form does include a representation that the franchising authority has served a copy on the cable operator.

[204] See, e.g., Nashoba Comments at 43; Carib. Comments at 8-10; NCTA Comments at 68.

of effective competition.[205] In addition, we will require franchising authorities to serve copies of their certification requests on cable operators. Such service copies must be sent by first-class mail on or before the date the certification form is filed with the Commission.

(b) Joint Certifications

i. Background

75. In the Notice, we proposed to allow two or more communities served by the same cable system to file a joint certification and exercise joint regulatory jurisdiction.[206] We noted that the legislative history contemplates joint regulation.[207] We sought comment on whether we should provide incentives for joint regulation or require governmental entities regulating a single economic entity to coordinate their activities. We also asked commenters to address how a cable operator can fulfill the Act's requirement that the operator's rate structure be uniform throughout a geographic area[208] if franchising authorities do not coordinate their regulatory activities.

ii. Comments

76. Commenters generally agree that joint certification should be permitted, but not required.[209] Municipal states that the advantages of joint regulation are obvious, and no further incentives are necessary.[210] Cole and

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[205] NATOA Comments at 25; Appendix D, infra.

[206] Notice, 8 FCC Rcd at 516.

[207] House Report at 80.

[208] Communications Act, § 623(d), 47 U.S.C. § 543(d). See further discussion of Section 623(d) at section II.A.5.a, infra.

[209] See, e.g., NATOA Comments at 32; Austin Comments at 29; Cox Comments at 66; Municipal Comments at 55-56. Nashoba argues that communities jointly served by a small system should be required to regulate jointly in order to reduce small system burdens. Nashoba Comments at 114. In light of the explicit statement in the House Report that the legislation should not be interpreted to require exercise of joint regulatory authority, see House Report at 80, we do not believe that we have the authority to require joint regulation in any circumstances. For discussion of small system burdens, see section II.A.5.f, infra.

[210] Municipal Comments at 55-56.

Continental, however, argue that in many cases it will not be appropriate. These commenters point out that where communities are served by the same system but their franchises contain different terms and conditions, were awarded in different years, and run for different periods, it would be difficult to exercise joint regulatory authority. Where the initial franchise encompasses multiple communities, however, the exercise of joint regulatory authority would be appropriate.[211]

iii. Discussion

77. We will permit, but not require, joint certification for communities served by the same system. We agree with Austin that joint certification and joint regulation may occur regardless of whether the areas covered have uniform rates.[212] Even where community-specific factors might cause rates to vary, we believe that joint regulation would provide efficiencies to the communities and to the cable operator. We also agree with Austin that joint regulation may take several forms, including arrangements where communities share the costs of data collection and hold joint hearings but make independent rate decisions.[213]

78. We will also permit joint certification for communities served by different systems, as Austin suggests.[214] As stated above, joint regulation does not necessarily mean that rates in each franchise area must be the same. Such joint certification could provide administrative economies to local authorities and to this Commission, which must process certification requests, as well as petitions for denial and revocation of certification. Finally, such joint certifications could ease the regulatory burden on cable operators by providing greater resources for franchising authorities and increasing the efficiency and expertise of local regulation.[215] The economies

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[211] Cole Comments at 17; Continental Comments at 18-19.

[212] Austin Comments at 29.

[213] Austin Comments at 29.

[214] Austin Comments at 29.

[215] Although we encourage efficient resolution of rate disputes, we are primarily concerned that the Act's provisions be implemented as faithfully as possible. While joint certifications may make resolution more difficult, as Cole Reply Comments at 13; Continental Reply Comments at 11-12 suggest, we believe that the increased benefits to administration of the Act's explicit framework (certification by the FCC of local authorities, local authorities' regulation of basic service rates) outweigh its

realized by franchising authorities and by cable companies where joint certification and regulation occurs could ultimately be reflected in improved rates and services for cable subscribers.

79. A related issue is whether a state may file a blanket certification on behalf of its franchising authorities. New York State Commission on Cable Television argues that since the legal authority of municipalities to regulate cable television rates is a matter of state law, a state agency with jurisdiction over cable can ensure that the Act's certification standards exist or will be met.[216] While allowing such blanket certifications would certainly be administratively efficient, we cannot reconcile permitting this procedure with the dictates of the Act. Section 623(a)(3) requires the franchising authority to certify that it fulfills the criteria for certification.[217] Moreover, the Act contemplates that some franchising authorities may choose not to regulate.[218] A blanket certification would deny franchising authorities in that state an opportunity to forego rate regulation. However, if a state (e.g. a statewide public utilities commission) is the franchising authority, it obviously would be the entity filing the certification for itself.[219]

(c) Approval of Certification by the Commission

i. Background

80. In our Notice, we stated that, pursuant to the Cable Act, a certification submitted by a franchising authority to the Commission shall be effective after 30 days unless we find that (1) the authority has adopted or is administering regulations inconsistent with those we prescribe; (2) the authority lacks the legal authority to adopt, or the personnel to administer, the regulations, or (3) interested parties are not

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negative effects.

[216] NYSCCT Comments at 17-18.

[217] See also SBA Comments at 11 n.17 (stating that Congress rejected amendments to the Act that would have required state utilities commissions to regulate).

[218] See discussion at section II.A.3.a.(1), supra.

[219] If the state acts as the franchising authority for unincorporated areas, it would also file the certification as the "franchising authority" for those areas. See NECTA Comments at 18-22 for a discussion of examples of states that hold rate regulatory authority at the state level.

provided a reasonable opportunity to express their views.[220] Because of the 30-day time constraint, we assumed that Congress did not intend that the Commission establish a full pleading cycle before acting on a certification. We thus proposed to base our decision on certification on the submission by the franchising authority alone. We sought comment on allowing parties to submit challenges to certifications by filing a petition for revocation once a certification is effective.[221]

81. We tentatively concluded in the Notice that denial of certification would be subject to our normal procedures for reconsideration, review, and appeal.[222] We also proposed to assume regulation of basic service rates in the event we denied certification. If we certified an authority, however, we proposed to require the local authority to notify its cable system within 10 days of our decision.[223]

ii. Comments

82. Comments on these proposals were mixed. Cable interests recommend that the Commission require franchising authorities to provide local cable operators with advance notice (ten to fifteen days) of the filing of a certification application with the Commission.[224] Operators maintain that this would allow for disputes to be addressed informally without involving the Commission. Some operators suggest that a franchising authority should be required to implement regulations prior to the submission of a certification in order to determine if they are consistent with those adopted by the Commission, suggesting that this might reduce the need to file petitions for certification, revocation, or denial.[225] Some operators also argue that they should be afforded the right to contest certification requests on jurisdictional grounds, i.e., legal deficiency or the presence of effective competition, prior to Commission action. Operators maintain that it would make little

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[220] Communications Act, § 623(a)(4), 47 U.S.C. § 543(a)(4).

[221] Notice, 8 FCC Rcd at 516-517, paras. 22-23.

[222] 47 C.F.R. §§ 1.101-1.120; 47 U.S.C. §§ 402, 405.

[223] Notice, 8 FCC Rcd at 517, para. 24.

[224] Cole Comments at 17-18; Continental Comments at 19; TimeWarner Comments at 29; TCI Comments at 54; Comcast Comments at 19.

[225] See, e.g., Cox Comments at 53.

sense to allow franchising authorities to begin rate regulation proceedings when they may lack the jurisdiction to do so.[226]

83. Most commenters agree that Congress did not intend that the Commission should institute a "full" pleading cycle in order to issue franchising authority certifications.[227] Nonetheless, there was concern, especially among cable operators, that given the constraints of this time schedule, the Commission's 30-day certification process may be nothing more than ministerial. Because there will be little time to review the substance of representations made, much less make adverse findings against certifications, operators argue that the Commission should establish a process where certification can subsequently be challenged without any presumption in favor of a "certified" cable franchisor.[228] NATOA, however, maintains that because Congress did not intend that the Commission establish a pleading cycle with an opportunity for interested parties to comment during the 30-day period, the Commission may base its decision on whether to grant certification solely on the filing by the franchising authority.[229]

84. Furthermore, in the event that we certify an authority, NATOA opposes our proposed requirement that a franchising authority notify a cable operator that it is certified within 10 days of the Commission's decision. Because NATOA does not oppose giving a cable operator prior notice that it has filed a certification, and because certification should be automatic absent an adverse finding, NATOA believes no further notice is necessary. Additionally, if the Commission does impose the requirement, NATOA contends that a franchising authority's failure to comply should not be the basis for revocation of its certification.[230]

iii. Discussion

85. The statute mandates that franchising authority certifications become effective within 30 days of filing unless this Commission finds that the authority does not meet the

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[226] Continental Comments at 19; Cole Comments at 18.

[227] See e.g., TCI Comments at 55; TimeWarner Comments at 30; NATOA Comments at 33; Cox Comments at 55.

[228] TimeWarner Comments at 30; TCI Comments at 55; Cole Comments at 19.

[229] NATOA Comments at 33.

[230] NATOA Comments at 33-34.

statutory certification requirements.[231] Given this extremely brief timeframe, and given that the grounds for certification pursuant to Section 623(a)(3) are matters to which a franchising authority is in the best position to attest, we do not believe that the Act contemplates or requires that operators be afforded an opportunity to contest any of these grounds prior to certification.[232] This interpretation will also alleviate administrative difficulties that will arise during initial implementation. The Commission may receive as many as 30,000 requests for certification (commensurate with the number of franchise areas across the nation) within a few weeks of the effective date of these regulations. As many cable commenters have recognized,[233] under such conditions, it is administratively impossible to provide a pleading cycle or to examine each franchising authority's certification in detail. Of necessity, this Commission must rely initially on the franchising authority's statement that it does in fact meet certification standards.[234] Therefore, we will permit challenges to certification only after the fact, as discussed below.

86. However, the finding of effective competition is essential to both franchising authority and FCC jurisdiction to regulate rates.[235] As described above,[236] franchising authorities may base their initial finding of effective competition on a presumption that such competition does not exist, with the burden on the operator to disprove this presumption. However, because of the short time frame in which certifications must be approved, operators will not have an opportunity to contest a finding of effective competition--a jurisdictional predicate to rate regulation--until after a franchising authority is certified. Under these circumstances, we will provide operators an opportunity to challenge a finding

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[231] Communications Act, § 623(a)(4), 47 U.S.C. § 543(a)(4).

[232] See FCC v. Florida Power Corp., 480 U.S. 245, 253 (1987) (Fifth Amendment does not bar imposition of nonconfiscatory rate regulation when private property devoted to public uses involved).

[233] See, e.g., Continental Comments at 19-20; TimeWarner Comments at 29-30; TCI Comments at 55.

[234] As discussed in section II.A.2.b, supra, we will allow the franchising authority to rely on a presumption that the cable operator in its area is not subject to effective competition. The cable operator will then have the burden to show that it is subject to effective competition.

[235] Communications Act, § 623(a)(2), 47 U.S.C. § 543(a)(2).

[236] See supra Section II.A.2.b.

of effective competition before rate regulation can be imposed upon them.

87. The process will work as follows. Franchising authorities may begin filing certifications with the Commission 30 days after publication of this Report and Order in the Federal Register, although there is no deadline by which a franchising authority must seek certification. As noted above, the franchising authority must use the FCC's certification form and must certify that it has served a copy of the certification request on the cable operator. The certification will take effect 30 days after it is filed unless the Commission denies certification within that period.[237] The franchising authority will then have 120 days in which to adopt regulations consistent with the Commission's regulations[238] and, if such rules are not already in place, to promulgate rules providing a reasonable opportunity for consideration of the views of interested parties.[239] The franchising authority must notify the cable operator that it has been certified and has adopted appropriate regulations before it can begin regulating rates and, if necessary, ordering refunds.

88. For its part, the cable operator may file a petition for reconsideration of the franchising authority's certification, subject to our normal requirements and procedures, including the statutory requirement that such a petition be filed within 30 days.[240] The 30-day period for such petitions will begin to run from the 30th day after the certification was filed with the Commission. A petition for revocation of certification,

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[237] To reduce our administrative burden, we will not notify the franchising authority that its certification has become effective. We will require the authority to either send the certification form by registered mail, "return receipt requested," or to hand-deliver the form to the Commission's Secretary in Room 222, 1919 M Street N.W., Washington, D.C., and obtain a date-stamped copy. Unless we notify the authority otherwise, the certification will become effective 30 days after the date on the return receipt or the date on the stamped copy.

[238] This requirement is not onerous; a straightforward rule stating that the local franchising authority will follow the rate regulations promulgated by this Commission will suffice.

[239] Question 3 of the certification form in Appendix D of the Notice, which requires the franchising authority to certify that it will adopt regulations consistent with those promulgated by the Commission, will be amended to include these requirements.

[240] 47 C.F.R. 1.101-1.120; 47 U.S.C. §§ 402, 405.

however, may be filed at any time after the expiration of the period for reconsideration.[241]

89. If the petition for reconsideration challenges the finding that effective competition is absent,[242] rate regulation will be automatically stayed until resolution of the petition, subject to refund liability back to the date the petition was filed if we subsequently determine that there is no effective competition. We are providing for an automatic stay of rate regulation for these petitions because challenges to the absence of effective competition bring into question whether a "finding" of no effective competition, a jurisdictional prerequisite to rate regulation, can be made.[243] As discussed previously, a cable operator has a statutory right to be free of regulation if effective competition exists.[244] This procedure prevents the imposition of rate regulation until the issue of the existence of effective competition can be determined.[245] At the same time, if after evaluating the petition for reconsideration we find that effective competition does not exist, the cable operator will be liable for any overages that may have been charged, dating back to the day on which its petition for reconsideration was filed. This approach will ensure that the rights of subscribers are protected during the pendency of the petition at the FCC.

90. Challenges to franchising authority certifications on other grounds, e.g., the authority does not have the legal authority to adopt regulations or the personnel to administer the regulations, may also be raised by petition for reconsideration, if filed within 30 days, or later by a petition for revocation. The party filing the petition may request a stay of rate regulation, which will be evaluated under our general

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[241] See discussion of revocation procedures, Section II.A.3.(d), infra.

[242] See discussion at section II.A.2.(b), supra, where we impose on alternative service providers an obligation to furnish the operator information on the number of households offered service and the number of subscribers if the information is not otherwise available.

[243] Communications Act, § 623(a)(2), 47 U.S.C. § 543(a)(2).

[244] See section II.A.2.(b), supra for discussion of due process concerns in the context of a finding of effective competition.

[245] As discussed section II.A.2.(b), supra, we will also adopt penalties for cable operators that file frivolous effective competition petitions simply to take advantage of the automatic stay of rate regulation.

requirements for imposition of a stay.[246] We will not impose an automatic stay of rate regulation when these challenges are made because the issue is not whether the cable operator should be subject to rate regulation at all, but rather whether the local authority or the Commission regulates the rates. Thus, there is no compelling need to stay rate regulation by the local authority pending resolution of these challenges, since the local authority will be performing the same function that we would conduct in any event.

91. We believe that this procedural approach strikes the appropriate balance between fairness to cable operators, satisfaction of the Act's jurisdictional prerequisites, and the congressional mandate for swift implementation of rate regulation. In providing that certifications become effective 30 days after they are filed unless the Commission disapproves them,[247] Congress clearly did not intend that we establish a full pleading cycle before certification. We have, however, provided cable operators an automatic stay of rate regulation if the existence of effective competition is at issue and provided an opportunity to petition for a stay if the franchising authority's certification is otherwise subject to challenge.

92. It is unclear how many challenges to certification requests we will receive as basic rate regulation is implemented across the country. Should a large volume of petitions for reconsideration[248] be filed, however, we will resolve the effective competition challenges first. Those pleadings will be limited in number since relatively few systems currently are subject to effective competition. We will then process the remaining petitions generally from the largest communities first to provide immediate benefit to cable operators with the most subscribers or, if the certification is upheld, to provide for speedy implementation of rate regulation in communities with the most subscribers. However, other factors, such as date of filing, may also be considered. A smaller community in need of immediate relief may petition the Commission for expedited consideration.

93. The Cable Act requires that, in disapproving a franchising authority's certification, we notify the authority of

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[246] 47 C.F.R. §§ 1.43(n), 1.106(n).

[247] Communications Act, § 623(a)(4), 47 U.S.C. § 543(a)(4).

[248] We discuss general procedures for revocation petitions filed after 30 days from initial certification have elapsed infra Section II.A.3.(d).

any modifications necessary to obtain approval.[249] The Notice proposed to reflect this requirement in our rules, and tentatively concluded that denial of certification would be subject to our normal procedures for reconsideration, review, and appeal.[250] Under the rules we adopt governing the certification pleading cycle, as discussed above, certification will generally occur. Cable operators and other interested parties will then have an opportunity to file for reconsideration. Our rules will provide that if we uphold a challenge to a certification on other than effective competition grounds, we will notify the authority of this denial and provide the franchising authority an opportunity to modify its certification however necessary to obtain approval.[251] If, after this opportunity to cure, the authority still fails to meet the certifications requirements, its certification will be revoked and the Commission will regulate basic service rates. Cable operators and franchising authorities may appeal our decision on reconsideration, subject to our normal procedures.[252]

(d) Revocation of Certification

i. Background

94. Section 623 (a) (5) provides that if we determine that state and local laws and regulations do not conform to our rate regulations, we "shall revoke" the jurisdiction of the franchising authority in question.[253] The Notice sought comment on whether this requires us to revoke an authority's certification whenever an authority's actions involve a violation of Section 623 (a) (3) (A), in that local regulations are inconsistent with our rate regulations. The statute also provides that if, upon petition by a cable operator or other interested party, we find that an authority has acted inconsistently with the requirements of Section 623 (a), we shall grant "appropriate relief."[254] We asked if "appropriate relief" means lesser remedies in situations, for example, where local and state laws may be facially consistent with our regulations, but the authority has applied them inconsistently or has otherwise

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[249] Communications Act, § 623(a)(4), 47 U.S.C. § 543(a)(4).

[250] Notice, 8 FCC Rcd at 517.

[251] Communications Act, § 623(a)(4), 47 U.S.C. § 543(a)(4). We will reflect this requirement in our rules.

[252] 47 C.F.R. 1.101-1.120; 47 U.S.C. §§ 402, 405.

[253] Communications Act, § 623(a)(5), 47 U.S.C. § 543 (a)(5).

[254] Id.

departed from the terms of its certification.[255] We also asked parties if actions other than inconsistent local and state laws -- for example, lack of adequate personnel --which would have caused us to disallow a certification in the first instance, would also form the basis for revocation.[256] We also sought comment on what procedures should apply if a cable operator, once not subject to effective competition, becomes subject to it. We tentatively found that an operator should be required to petition a franchising authority for a change in regulatory status. We sought comment on whether a challenge to a franchising authority's denial of change in status could be made as part of a petition for revocation.[257]

ii. Comments

95. Comments were mixed regarding our interpretation of Section 623 (a) (5). Some cable operators believe that the Commission must revoke a franchising authority's certification if its regulations conflict with our regulations and there is a violation of Section 623 (a) (3) (A).[258] However, some municipalities suggest that this remedy is not mandatory,[259] and others assert that revocation is an extreme remedy which should be invoked only when the franchising authority has consistently and repeatedly disregarded our regulations.[260] NATOA agrees that lesser remedies are appropriate where the authority's actions involve noncompliance with Sections 623 (a) (3) (B) or (C), i.e., where local and state laws may be facially consistent with our regulations, but the authority has applied them inconsistently or has otherwise departed from the terms of its certification.[261] However, CATA and NCTA argue that the Commission should not limit the grounds for revocation only to Section (a) (3) (A), i.e., to state or local laws that are inconsistent with our regulations.[262]

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[255] Notice, 8 FCC Rcd at 517, paras. 25-26.

[256] Communications Act, § 623 (a)(3)(B); 47 U.S.C. § 543(a)(3)(B); Notice, 8 FCC Rcd at 517, para. 26.

[257] Notice, 8 FCC Rcd at 517, para. 28.

[258] Caribbean Comments at 10.

[259] NATOA Comments at 35.

[260] Palm Comments at 9.

[261] NATOA Comments at 35.

[262] CATA Comments 29-30; NCTA Comments at 70.

96. Municipalities agree with the Notice[263] that a petitioner for revocation should serve a copy of its petition on the local authority but they disagree on the amount of time an authority should have to respond to the petition. They are unanimous that 15 days as proposed in the Notice is not enough time to respond. They suggest response times ranging from 30 to 90 days.[264]

97. Comments also vary regarding what procedures and pleading cycles are to be implemented when a cable system that has been previously regulated becomes subject to effective competition. Cox maintains that in order to expedite the decertification process, the Commission should permit an operator and a franchising authority to agree that effective competition is present in the cable community. Thereafter, an operator would no longer be subject to rate regulation, and the authority would notify the Commission that its certification should be cancelled because of the changed status of the system.[265] NATOA argues that it is virtually impossible for a franchising authority, once it receives a petition from a cable operator, to review the petition, provide public notice of such petition, solicit opposition, and obtain public comment, all within a seven to ten day period the Notice proposes to allow for the filing of oppositions to such petitions.[266] NATOA suggests 120 days to make the initial review of the petition, which would include the filing of oppositions and public comments, with 90 days to make a decision if additional information is necessary.[267] NCTA, however, maintains that franchising review should be expedited and the authority should be required to render its decision within 30 days after submission of an operator's petition. Commission ratification of this decision, according to NCTA, should occur within an expedited time frame of 15 days after receipt of notification of the authority's decision.[268]

iii. Discussion

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[263] Notice, 8 FCC Rcd at 517, para. 27.

[264] See, e.g., NJ Comments at 20 (30 days); NATOA Comments at 37 (90 days); Austin Comments at 31 (60 days); Miami Comments at 11 (30 days).

[265] Cox Comments at 61-62.

[266] NATOA Comments at 36-37 n. 18; Notice, 8 FCC Rcd at 517, para. 28.

[267] NATOA Comments at 36-37 n. 18.

[268] NCTA Comments at 71.

98. The language of Section 623 (a)(5) requires us to revoke a franchising authority's certification if, after the franchising authority has been given a reasonable opportunity to comment, we determine that state and local laws and regulations do not conform to our rate regulations. In such cases, we will assume jurisdiction, as discussed below,[269] over basic service rates until an authority becomes recertified. We take the directive of 623 (a)(5), that we "shall revoke" certification if "state or local laws and regulations are not in conformance" with our rate regulations, to apply to local and state rules that on their face conflict with ours, and which have been interpreted by state and local authorities to so conflict.

99. We also find that an authority's failure to fulfill each of the three conditions for certification, Section 623 (a)(3)(A), (B) or (C), may be grounds for revocation, since failure to meet any of these conditions would have been grounds initially for denial of certification. However, as Continental and Cole suggest, in such cases we will first remand to the franchising authority with directions on how defects should be corrected. We will also consider any resubmission made by the franchising authority on an expedited basis. We believe that providing authorities this rapid opportunity to cure provides "appropriate relief" within the meaning of Section 623 (a) (5) for franchising authority actions that are inconsistent with certification. We will revoke certification in these cases only if the franchising authority fails to implement properly our remand order.

100. We will require a petitioner for revocation against a franchising authority to serve a copy of its petition on the franchising authority. The petition must contain a statement that such service was made. However, we are persuaded by municipalities' arguments that 15 days as initially proposed is not enough time for franchising authorities to file oppositions to such petitions[270] because such a time frame may be administratively impossible in jurisdictions that may require city or county approval before a response can be made. We will therefore grant authorities 30 days to file such oppositions, and also permit 15 days for replies. While the petition is pending, and absent grant of a stay, the franchising authority may continue to regulate the basic service rates of its franchisees.

101. If an operator in a particular franchise area, once not subject to effective competition, becomes subject to it, the operator may petition the franchising authority for change in its

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[269] See infra Section II.A.3.(e).

[270] NJ Comments at 20; NATOA Comments at 37; Austin Comments at 31; Miami Comments at 11.

regulatory status. We do not agree with NATOA that a 120 day time period is necessary in order for a franchising authority to review petitions and solicit oppositions in these matters, but we do agree that interested parties need more time to file oppositions to such petitions than the time period proposed in the Notice. To take account of the authority's obligation to give such petition for change in regulatory status adequate public notice, the time for filing oppositions will run from the time public notice of the petition is given, and will be set for 15 days. Oppositions must be served on the operator. The operator bears the burden of proving the existence of effective competition in challenges to initial certification,[271] so that formulating an opposition in these matters should not be that burdensome. Moreover, as the presence of effective competition nullifies the jurisdiction to regulate under the Act, we believe that comment on and opposition to such allegations must be taken expeditiously. We will also require authorities to permit operators to reply within seven days. In addition, as NCTA requests,[272] we will require franchising authority decisions on such petitions to be made 30 days after the pleading cycle closes and to be publicly released. Franchising authorities must submit to the Commission in ten days any decision changing status. Such decisions will become final in 30 days from the public notice of the decision, unless we receive a petition or other pleading opposing it, or decide, on our own motion, that it is defective. If an initial determination of the franchising authority that effective competition exists becomes final, the franchising authority would then cease regulating basic cable service rates, and our regulatory authority over cable programming services for the system in that franchise area would also cease. Operators denied a change in status by a franchising authority would be entitled to seek review of that finding by the Commission, by means of a petition for revocation, as discussed supra, this Section. In addition, in case a franchising authority has not been certified, a petition for change in status can be made directly to the Commission. We will apply the same time periods for filing pleadings as those set forth above for local franchising authorities.

102. We further conclude that in order to expedite a finding of changed status, we will allow an operator and a franchising authority to agree that effective competition exists, and to submit a joint statement to the Commission to that effect. The statement must stipulate which of the three statutory tests has been met for effective competition,[273] and explain how this

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[271] See supra Section II.A.2.b.

[272] NCTA Comments at 71.

[273] See Section II.A.2.a, supra.

test has been satisfied. The statement also must be released to the public by the franchising authority on or before the day it is submitted to the Commission. Such joint statements will become final decisions within 30 days of filing with the Commission, unless challenged by an interested party.

(e) Assumption of Jurisdiction by the Commission

i. Background

103. Section 623(a)(6) of the Communications Act requires that if we disapprove or subsequently revoke a franchise certification, we must exercise the jurisdiction of the franchising authority until the authority qualifies to exercise that jurisdiction.[274] The Cable Act also requires that we act on the new certification request within 90 days after it is filed by the franchising authority. The Notice sought comment on the procedures that we should utilize in the event that we assume jurisdiction over basic service rates.[275]

ii. Comments

104. There is some division among the parties regarding whether, in the event of denial or revocation of certification, our assumption of jurisdiction should be automatic. Cox believes that existing operators should not be required to file a rate schedule with the Commission, or have rates subject to Commission review unless the local franchising authority, upon dismissal or revocation of its certification, requests this.[276] In contrast, the City of Sterling believes that the Commission should require the cable operator to file its rate schedule with the Commission after denial or revocation of certification as proposed in the Notice.[277]

105. Where the Commission assumes jurisdiction over basic service rates, some municipalities and cable interests believe that we should follow the same procedural rules and deadlines we establish herein for local franchising authorities

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[274] Communications Act, § 623(a)(6), 47 U.S.C. § 543(a)(6). The Notice also explained that if we dismissed a request for certification or revoked an outstanding certification on the ground that effective competition existed in the franchise area, we would not assume rate jurisdiction.

[275] Notice, 8 FCC Rcd at 517.

[276] Cox Comments at 69.

[277] Sterling Comments at 8.

certified to regulate basic service rates.[278] The City of Sterling, however, states that it would be "administratively infeasible" for the Commission to meet the same deadlines that we are establishing for local franchising authorities.[279] Cox proposes a specific pleading cycle and decisional deadline for cases in which we assume jurisdiction.[280]

iii. Discussion

AA. Basic Rate Review

106. Section 623(a)(6) provides that if we disapprove or revoke a franchising authority's certification, we "shall exercise" the franchising authority's jurisdiction until it requalifies.[281] We do not believe, as Cox suggests,[282] that the Act permits our exercise of jurisdiction to rest on the authority's discretion to request us to do so. Moreover, because the Act provides that we can deny or revoke a certification if the authority's regulations do not conform to ours, there may be cases where an authority would not request our assumption of jurisdiction because of disagreement with federal policies.[283] Thus, upon denial of or revocation of certification, we will notify the local franchising authority and the cable operator of our action and inform them that we are assuming jurisdiction over regulation of basic service rates. The notification to the cable operator will require it to file its basic rate schedule with the Commission within 30 days using the appropriate FCC form.[284] We will also require the operator to serve a copy of its rate schedule on the local franchising authority.

107. When we assume jurisdiction over basic service rates and associated equipment, we will apply procedures

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[278] Rapids Comments at 22; Cox Comments at 68.

[279] Sterling Comments at 8.

[280] Cox Comments at 68-69 (30 days for interested parties to comment on proposed rate increase, 15 days for operator to respond; if within benchmark, rate increase automatically effective after 30 days; if outside benchmark, 60 days after the filing unless found unreasonable)

[281] Communications Act, § 623(a)(6), 47 U.S.C. § 543(a)(6).

[282] Cox Comments at 69.

[283] Cable Act, §§ 623(a)(4)(A), 623(a)(5), 47 U.S.C. §§ 543(a)(4)(A), 543(a)(5).

[284] See Appendix D.

analogous to those applicable to local franchising authorities. We make some modifications, however, to permit participation of local franchising authorities, to take account of our comparative lack of familiarity with the history and particular characteristics of basic rate charges in a community, and to allow us to resolve the significant volume of such cases, corresponding to the approximately 30,000 franchise areas in the country, which potentially may come before us.

108. Basic rate filings for existing rates or proposed rate increases for services and equipment (including increases in the average per channel rate that result from reductions in the number of channels in a tier) must calculate relevant benchmarks, caps, and permitted adjustment factors as required on FCC Form 393.[285] Operators with existing or proposed rates above their maximum permitted levels must submit a cost-of-service showing sufficient to support a finding that the rates are reasonable.[286]

109. Basic rate filings must be served on the franchising authority on or before the day they are filed with the FCC. Such filings will also be placed on public notice by the Commission so that other interested parties may have an opportunity to review the filings. Filings proposing rates or rate increases within the Commission's reasonableness standard must be made on 30-days notice and can become effective 30 days after public notice if unopposed, unless the Commission issues an order deferring their effective date or denying them. Filings proposing rates above the presumptively reasonable level must be made on 90-days' notice[287] and be accompanied by a cost-of-service showing.[288]

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[285] See Appendix D.

[286] We will request further comment on cost-of-service standards and further refine the information required in a cable system's cost-of-service showing after we issue an order delineating these standards.

[287] Communications Act, § 623(b)(6), 47 U.S.C. 543(b)(6), requires 30 days notice "to a franchising authority" of any increase proposed for the basic service tier. As explained above, the different constraints which operate when a federal agency assumes jurisdiction over what is primarily a local function necessitate some modifications to local procedures.

[288] See supra Section II.A.3.(b). We disagree with Cox's position that a rate which appears to meet our reasonableness test should always be automatically effective. There may be circumstances, such as where calculations are erroneous, where automatic approval is unjustified.

110. Petitions opposing a filing which proposes a rate or rate increase that falls under the presumptively reasonable level must be filed within 15 days after public notice of the filing, and must be served on the cable operator. Oppositions will be due five days after filing of the petition. This streamlined procedure is appropriate for the relatively simple calculations necessary to ascertain whether a filing falls within permitted levels. Such petitions should demonstrate how the rates in issue are above the reasonable level. In addition, any such petitions that request that additional information be obtained from the operator must specify with particularity the reasons for the request. They will not be routinely granted.

111. Petitions opposing filings which propose rates above the presumptively reasonable level should be filed within 30 days after public notice of the rate filing, with oppositions due in 10 days after petitions are filed. Should it be necessary to request additional data from the operator, we will apply our existing rules to help protect against disclosure of proprietary information.[289] We believe that the different pleading cycles we adopt are preferable to the across-the-board cycle Cox proposes because they will result in expeditious handling of those rate filings that involve straightforward calculations, while also allowing additional time for parties to analyze more complex filings.[290]

112. We are concerned that operators' proposed rate increases be reviewed as thoroughly, but as quickly, as possible, in order to ensure that a cable system's basic service rates are reasonable for consumers and the operator. Thus, we expect that unopposed rates and rate increases which are beneath the permitted level generally can become effective in 30 days unless we issue an order suspending implementation of the proposed rate. For filings above the presumptively reasonable level, we will use the 180-day constraint we impose on franchising authorities as an internal processing guideline.[291] However, our review of rates will also need to take into account the views of any franchising authority that participates as a party in the proceeding, as well as to weigh any particular historical and local factors which are pertinent. Moreover, the volume of such cases could potentially outstrip our administrative resources. Thus, extraordinary circumstances may prevent resolution of all basic rate cases which come before us within the same 180-day deadline imposed on

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[289] 47 C.F.R. § 0.459. See Sections II.A.3.(b) and II.A.4.(b)(1), supra.

[290] Cox Comments at 68.

[291] See infra Section II.A.3.(b).

the franchising authority responsible for ensuring the reasonableness of the rates of a single cable operator.

BB. Recertification

113. The 1992 Cable Act permits our assumption of basic rate jurisdiction until the authority has filed a new certification and we approve it. We must act on a new certification request within 90 days.[292] In order to expedite processing, such a request should be clearly marked as a "Petition for Recertification." As the Act requires, it must meet the requirements for original certification.[293] The petition should also contain a clear showing, supported by either objectively verifiable data such as a state statute, or affidavit, that the underlying reasons for revocation or denial no longer pertain, and must attach a copy of the earlier decision denying or revoking certification. The new certification request must be served on the cable operator and any interested party that participated in the proceeding denying or revoking the original certification. Any party wishing to oppose the new certification request must do so 15 days after the request is filed. The authority may reply within seven days.

b. Implementation and Enforcement of Basic Tier Rates

i. Background

114. The Notice sought comment on the procedures we are required to establish under the Act for enforcement and implementation of basic service rate regulations. We invited comment on an expeditious way to trigger initial review of a cable operator's current basic tier rate once a local franchising authority has been certified to regulate those rates. We asked how local authorities might achieve expedition in ratemaking procedures while at the same time ensuring that all parties receive the due process to which they are entitled. We also sought comment on whether deadlines should be imposed for franchising authority action on a requested rate increase, and whether a requested rate increase should become effective if a franchise authority did not act within such period, with the possibility either that such an increase could be subject to later refund or that a franchising authority could toll its deadline in particular circumstances. We also asked for comment on how proprietary information should be handled, on what remedies and penalties might be afforded local authorities and the Commission, on the proper forum for appeals of local authorities' rate decisions, and on how to implement the

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[292] Communications Act, § 623(a)(6), 47 U.S.C. § 543(a)(6).

[293] Communications Act, § 623(a)(3), 47 U.S.C. § 543(a)(3).

requirement that operators inform subscribers regarding a basic service tier and its availability.[294]

ii. Comments

115. Cable interests expect that franchising authorities should render decisions on basic rate increases by the end of the 30-day notice period for rate increases required in the Act,[295] and some believe that increases which are reasonable under our rules or which represent pass-through of exogenous costs, should be effective automatically.[296] Franchising authorities generally urge longer periods for an initial review of existing rates[297] or a proposed rate increase[298] and some believe additional time should be permitted if the authority must request further information.[299] Several parties suggest a two-step approach under which requests for rate increases that are presumptively reasonable under our rules would become effective 30 days after notice to the franchising authority, but franchising authorities would have an additional 30 or 60 days to act on rate increases that are not reasonable on their face and to order refunds, if necessary.[300] With respect

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[294] Notice, 8 FCC Rcd at 528-529, paras. 80-85, 87-89.

[295] Nashoba Comments at 91; NCTA Comments at 73; Blade Comments at 11; Adelphia Comments at 96; Newhouse Comments at 35; Continental Comments at 45; Caribbean Comments at 16-17; CATA Comments at 31; see also New England Reply Comments at 6-7.

[296] See, e.g., Armstrong Comments at 28; Cox Comments at 62-63; Caribbean Comments at 18-19; Time Warner Comments at 35, citing House Report at 82; TCI Comments at 35; see also USA Network Comments at 3-8; IFE Comments at 3-4.

[297] Miami Comments at 12-13; Baltimore Comments at 11 (90-days); Municipal Comments at 17-18 (180-days).

[298] See e.g., Baltimore Comments at 11; Miami Comments at 13; Atlanta Comments at 1 (90 days); Dover Comments at 19-20 (90 or 120 days); NATOA Comments at 56 (initial 120-day review, with additional 90 days if further information needed); Fort Comments at 2; Connecticut Comments at 13 (120-days); Municipal Comments at 21-22 (60-day notice, with possibility of 150-day suspension). See also Austin Reply Comments at 38-40; Lower Merion Reply Comment at 5 (90 days); Bowling Green at 11-12.

[299] See e.g., NATOA Comments at 56.

[300] See Northland Comments at 28-29; Cole Comments at 34; Continental Comments at 43-45. Under Continental's proposal, franchising authorities would have a maximum of 60 days to act on

to ensuring compliance, most franchising authorities argue that the 1992 Cable Act gives them authority to establish reasonable rates together with the authority to order rebates and rollbacks if needed.[301] Cable operators, on the other hand, argue for a more limited role in actual rate setting for franchise authorities.[302] With some exceptions,[303] most parties believe that the FCC should be the forum for review of local authorities' basic rate decisions.[304]

iii. Discussion

1. Review by Local Franchising Authorities

(a) Initiation of Basic Cable Rate Review

116. As a threshold matter, we must select an expeditious way to trigger initial review of a cable operator's current rates for the basic service tier and accompanying equipment once a local franchising authority has been certified to regulate those rates. As proposed in the Notice, we believe an operator should file its schedule of rates for the basic service tier and accompanying equipment with the franchising authority within a relatively brief period after receiving notice from the franchising authority that it has been certified by the Commission and has adopted appropriate regulations that are consistent with our own rules and that give interested parties a reasonable opportunity to comment.[305] We will thus require a cable operator to file its schedule of rates for the basic service tier and accompanying equipment with the local franchising authority within 30 days after receiving such notice. Information on its own rates and the data needed to assess the

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rate increases that are under the Commission's benchmarks and an additional 60 days for increases that exceed the benchmarks so that they may obtain additional information.

[301] Meritor Reply Comments at 3; Charlotte Reply Comments at 3; Coffeyville Reply Comments at 2; CalCities Reply Comments at 3.

[302] TCI Reply Comments at 65; Time Warner Reply Comments at 37; NCTA Reply Comments at 66.

[303] See Connecticut Comments at 13; see also NYSCCT Comments at 2 (state agency should be forum for appeals of local rate decisions).

[304] See, e.g., Continental Comments at 47; CFA Comments at 157; Nashoba Comments at 92; Miami Comments at 16.

[305] Notice, 8 FCC Rcd at 528, para. 80; see discussion at section II.A.3.a.(2)(c), supra.

reasonableness of those rates are readily available to the cable operator. Thus, this 30-day period should afford sufficient time to cable operators to submit their current basic tier rates and any necessary supporting materials such as how their rates conform to the Commission's rate standards.[306] In addition, taken in conjunction with the time periods we establish for decisions on basic service rates, this 30-day period ensures that neither local franchising authorities nor cable operators delay in starting the rate review process, thereby benefitting subscribers in that community.

(b). Franchising Authority Review of Basic Cable Rates

117. Franchise authority review of a cable operator's current rates for the basic service tier and accompanying equipment, and proposed increases in these rates, require expedition so that protracted proceedings and concomitant uncertainty do not injure an operator's ability to serve the community.[307] At the same time, franchising authorities are required by the 1992 Cable Act to provide a reasonable opportunity for consideration of views of interested parties. In addition, some rate determinations may be more difficult than others because, for example, the proposed rates exceed the Commission's reasonable rate standards and require a more detailed cost-of-service analysis.[308]

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[306] We note, in this regard, that operators will have been on notice that their basic tier rates might be subject to regulation in the near future since the franchising authority's filing of a request for certification with us. See supra at Section II.A.3.a.(2)(c), (requiring the franchising authority to serve the operator with its certification request); see also Appendix D, containing Form 393, for discussion of information that is to be submitted by cable operator.

[307] See, e.g., Continental Comments at 45-46; Cole Comments at 35.

[308] The reasonableness of a given rate will be assessed by applying an FCC-prescribed benchmark formula using characteristics of the cable system at issue. Rates below the "benchmark" rate produced by the formula will be deemed reasonable; rates above the benchmark must either be reduced by a specified amount or justified by a cost-of-service showing in order to be found reasonable under the Commission's standards. Increases in basic service rates will then be subject to a price cap scheme. The mechanics of this approach are discussed in detail infra section II.A.3.c.(2)(f).

118. To reconcile these competing interests, we will adopt a two-step approach.[309] Under the first step, if a franchising authority is able to determine that a cable operator's current rates for the basic service tier and accompanying equipment are reasonable under the Commission's rate standards, the rates will go into effect 30 days after they are submitted. Similarly, if the franchising authority finds that a proposed increase in these rates is reasonable under the FCC's rules, the increase will go into effect 30 days after filing with the franchising authority.

119. Under the second step, if the franchising authority is unable to determine whether the proposed rates for the basic service tier and accompanying equipment are reasonable, based on the material before it, or if the cable operator has submitted a cost-of-service showing seeking to justify a rate above the reasonable level, the franchising authority may toll the effective date of the proposed rates for an additional period of time to make a final determination. Specifically, a franchising authority may toll the effective date of the proposed rates for 90 additional days if it needs additional time to ensure that a proposed rate is within the Commission's reasonableness standard. A franchising authority may, however, toll the effective date of the proposed rates for 150 days to evaluate a cost-of-service showing seeking to justify a basic service rate or rate increase above the presumptively reasonable level.[310] To toll the effective date of the proposed rates, the franchising authority must issue a brief order, within the initial 30-day period, explaining that the franchising authority needs additional time to review the proposed rates.[311] During these 90 or 150-day periods, the franchising authority can solicit additional information from the cable operator, if necessary, and consider the views of all interested parties. However, the franchising authority must take action on the

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[309] See generally Northland Comments at 28-29; Cole Comments at 34.

[310] If a cable operator submits a proposed rate increase for review that appears to exceed the presumptively reasonable level and does not include a cost-of-service showing to justify the rate, the franchising authority must permit the cable operator to cure this deficiency and submit a cost-of-service showing.

[311] If the franchising authority is unable to determine whether the proposed rate complies with the Commission's reasonable rate standard, then the order tolling the effective date of the proposed rate should explain why the franchising authority could not make such a determination. The order should also provide the cable operator an opportunity to cure any deficiencies in its original filing.

proposed rate within these additional 90 or 150 days. If no action is taken within these time periods, the proposed rates will go into effect, subject to subsequent refund orders.[312] Nevertheless, a franchising authority may issue a written decision after the additional 90 or 150 days have lapsed and order refunds for any portion of the proposed rates that are found to be unreasonable and are not sufficiently justified. In such situations, a franchising authority must issue a brief written order at the end of the 90 or 150 day periods requesting the cable operator to keep accurate account of all amounts received by reason of the proposed rate and on whose behalf such amounts are paid.[313]

120. This two-step approach appropriately balances the cable industry's desire for expedition in the rate determination process and the franchising authorities' need for a sufficient amount of time to obtain the views of interested parties and to make an informed and reasoned judgment on proposed rates. The first step promotes the goal of expedition to the fullest extent possible by requiring franchise authorities to evaluate a cable operator's showing within 30 days. If the franchising authority takes no action within this 30-day period, the proposed rate will go into effect.[314]

121. The second step permits franchising authorities sufficient time to make informed decisions by providing additional time in those cases that are likely to be complex -- i.e., where it cannot be determined, based on the material submitted, whether the operator's rates are reasonable or where a cost-of-service showing is necessary to justify a rate above the permitted levels.[315] We believe that a total of 120 days (i.e.,

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[312] As explained in Section II.A.3.b.(2)(a), infra, any refunds ordered by the local franchising authority may extend back only to the effective date of our rules in this proceeding or one year, whichever is shorter.

[313] See infra id. for a discussion of refunds and accounting orders.

[314] We note that where a proposed rate increase goes into effect due to franchise authority inaction, of the authoprity fails to take any action regarding the reasonableness of current rates, the authority lacks the power to order refunds. If the authority wishes to retain the right to order such refunds, it must at minimum issue an order stating that it will need additional time to reach a decision on the merits.

[315] At least one commenting party interprets Section 623(b)(6) of the Cable Act as requiring local franchise authorities to review and render a decision on a proposed rate increase within 30 days

30 initial days plus 90 additional days) should be a sufficient amount of time to resolve cases requiring further analysis or documentation to ensure that a proposed rate is within the presumptively reasonable level. We are also of the view that 180 days (i.e., 30 initial days plus 150 additional days) should be enough time to review cost-of-service showings seeking to justify rates above the reasonable level. We believe that delaying rate determinations in either of these instances for more than 120 or 180 days, and the uncertainties likely to result therefrom, may have an adverse effect on a cable operator's operations, planning and financial stability. Consequently, we believe that tolled rates that are alleged to be within our reasonableness standard should go into effect after 120 days and that tolled rates proposed in a cost-of-service showing that exceed the presumptively reasonable level should go into effect after 180 days. While we are permitting these rates to go into effect, we recognize, as suggested by some franchising authorities[316], that in unusually complex cases, an even greater period of time may be necessary to prepare a rate decision. Consequently, we will permit a franchising authority to issue a written decision after 120 or 180 days and to order refunds for up to a one year period for any amounts later found to be inconsistent with the Cable Act or our rules.

122. We also believe that there are deficiencies in the other options proposed in the Notice that make them less desirable than the two-step approach we adopt. For example, the proposal to have all proposed rate increases become effective within 30 days, subject to refunds,[317] could undermine the intent of Congress -- as expressed in the legislative history of the Act -- to protect consumers' interests against potentially unreasonable rate increases.[318] Our two-step approach seeks to avoid this result by permitting franchising authorities to toll proposed rates and to analyze them for 120 or 150 days before the rates become effective. In addition, as discussed above, 30 days is probably not a sufficient time period to resolve complex rate cases where the presumptively reasonable rate level is being

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after receiving notice from the cable operator of the proposed increase. See Caribbean Comments at 16. We disagree with this view. The explicit language of this section requires a cable operator to give advance notice of 30 days to a franchising authority of an intent to raise rates, but has no specific application to franchising authority decisions on such proposed increases.

316 See, e.g., NATOA Comments at 56.

317 See, e.g., CATA Comments at 30-31.

318 See Conference Report at 60-62; House Report at 79.

exceeded. Also, the second proposed option, to use the Commission's tariff model and require all rate determinations to be made in 90 or 120 days, would likely cause needless delays in simple cases where the rates are readily determined to be reasonable under the Commission's rate standards.[319] Finally, we believe that the two-step approach should apply to both initial and subsequent reviews of rates because the same concerns regarding the need for expedition and for sufficient time for meaningful review by the franchising authorities are present in both contexts and because the two-step approach provides the necessary flexibility to accommodate these competing concerns.

(c) Due Process Concerns

123. Having established expeditious time periods for local franchising authorities to review rates for the basic service tier and accompanying equipment, we next must ensure that all parties receive the due process to which they are entitled. First, to ensure that interested parties have an adequate opportunity to comment, the Notice proposed that a cable operator notify subscribers in writing of a proposed rate increase at approximately the same time it notifies the franchising authority, i.e., at the billing cycle closest to 30 days before any proposed increase is effective.[320] While there was widespread support for this proposal from both municipalities and cable operators,[321] there was disagreement among the commenters as to the content and manner in which this notice should be provided. For example, NATOA contends that cable operators should provide notice not only to subscribers but also to potential subscribers through local newspapers or other means, because they are interested parties.[322] In addition, NATOA suggests that "such notice also should inform subscribers where and how they might contest the rate increase."[323] On the other hand, one MSO that addressed this issue contends that requiring cable operators to publish proposed rate increases in newspapers is unnecessary, since prospective subscribers do not have standing to sue.[324] Likewise, another MSO contends that

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[319] Notice, 8 FCC Rcd at 528, para. 80.

[320] Notice, 8 FCC Rcd at 529, para. 84.

[321] See, e.g., NATOA Comments at 59; Continental Comments at 45; Cole Comments at 34; Miami Comments at 14; Minnesota Comments at 17; and NY Consumer Comments 10.

[322] NATOA Comments at 59.

[323] NATOA Comments at 60; see also Minnesota Comments at 17-18.

[324] See Time Warner Reply Comments at 36.

compelling cable operators to provide a package of materials explaining the mechanics of lodging rate complaints and other background information would be burdensome and unnecessary, since Section 76.607 of the Commission's Rules already provides each customer with a contact person for complaints.[325]

124. We shall require, as we proposed in the Notice, that a cable operator notify subscribers in writing of a proposed increase in the rates for the basic service tier and accompanying equipment at approximately the same time it notifies the franchising authority -- that is, at the billing cycle that is at least 30 days before any proposed increase is effective.[326] As several cable operators note, linking subscriber notification to the billing cycle that is at least 30 days prior to the effective date of a pending rate increase makes it easier for cable operators to comply with this requirement. Many cable operators use billing cycles through which mailings to subscribers are spread over a period of time, so that not all subscribers are mailed a bill on the same day.[327] We will not, however, require that a cable operator also publish a notice of a proposed rate increase in newspapers or provide information to subscribers regarding how to lodge complaints. Such requirements do not appear to be necessary, in light of the individual written

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[325] See Continental Reply Comments at 23-24. Section 76.607 of the Commission's Rules requires, inter alia, that cable operators establish procedures for resolving complaints regarding the quality of the television signal delivered, maintain records of these complaints for one year, and notify subscribers of the procedures for resolution of complaints by the cable operator, including the address of the responsible officer of the local franchising authority.

[326] We recognize that Section 76.309(c) of the Commission's Rules, which was recently adopted in the Consumer Protection and Customer Service Proceeding, MM Docket 92-263, requires, among other things, that customers be notified by operators at least 30 days in advance of any changes in rates within the control of the cable operators. See Report and Order in MM Docket 92-263, FCC 93-145 (released April 7, 1993). We believe that Section 76.309(c) harmonizes with the rule we are adopting in the instant proceeding -- that is, requiring operators to notify subscribers of any proposed increase in basic tier rates at the billing cycle closest to 30 days before any proposed increase is effective. While subscribers would receive notifications on a staggered basis because of different billing cycles, they would nevertheless have 30 days before their payments are due, thereby giving them 30 days notice before they would have to pay an increased rate.

[327] See, e.g., Cole Comments at 34 n.16; Continental Comments at 45.

notification requirement we adopt and our recently adopted customer service requirements.[328] Section 623(b)(2)(A) requires that we seek to reduce "administrative burdens on subscribers, cable operators, franchising authorities, and the Commission," and this is a case where the operator's administrative burden may appropriately be reduced. At this time, we are not requiring that each notice of a rate increase include information on how subscribers can contest rates formally. Such information should be available from either the franchising authority or this Commission.[329] We will, however, require cable operators to include in their subscriber notifications the name and address of the local franchising authority, so that the requisite information on procedures for public participation in ratemaking proceedings can be readily obtained by a subscriber.

125. The Notice proposed to permit any interested parties, including subscribers, to participate in proceedings before franchising authorities on basic cable rates.[330] It also solicited comment on what the appropriate pleading cycles should be.[331] The commenters that address this issue urge that local, not federal, regulations should govern comment by interested parties and that local authorities should have the flexibility to apply such regulations.[332] Moreover, they assert that any concerns regarding the adequacy of comment periods should be resolved by the fact that franchising authorities must certify pursuant to Section 623(a)(3)(C) that they "provide a reasonable opportunity for consideration of the views of interested

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[328] Report and Order in MM Docket No. 92-263, FCC 93-145 (adopted March 11, 1993 and released April 7, 1993) (requiring, as part of Federal customer service standards applicable to cable operators nationwide, subscriber notifications regarding complaint procedures, including the address and telephone number of the local franchise authority's cable office).

[329] In order to keep administrative burdens as low as possible, we will also not require, as suggested by NY Consumer, that cable operators notify state and local governmental entities other than franchising authorities of rate increase requests. See NY Consumer Comments at 11. Cable operators could voluntarily provide notice of pending rate increases to other interested state and local governmental entities, however.

[330] Notice, 8 FCC Rcd at 529, para. 84.

[331] Id.

[332] See, e.g., NATOA Comments at 60-61.

parties."[333] We agree that it is appropriate to leave franchising authorities flexibility regarding the manner in which they will permit interested parties to participate meaningfully in proceedings regarding rates for the basic service tier and accompanying equipment. Indeed, many jurisdictions already have rules governing pleading cycles and public participation in place. However, any such rules must provide a reasonable opportunity for consideration of the views of interested parties, and should take into account the time periods that franchising authorities have to act on either initial review of basic cable rates or requests for increases.

126. Given the statute's emphasis on expedition, the Notice did not propose to require a franchising authority to hold formal hearings on rate increases or rate-related disputes, but did propose to require the authority to issue written decisions explaining its disposition of each rate increase request[334]. The consensus of commenting parties is that franchising authorities should be required to issue written decisions.[335] We will thus require that a franchising authority issue a written decision to the public and give public notice[336] of such decision whenever it disapproves, in whole or in part, either initial rates for the basic service tier and accompanying equipment, or a request for an increase in those rates, or approves a proposed rate over the objections of interested parties. Such a publicly available decision is necessary to protect the due process rights of the cable operator, so that it can know why the rate was disapproved and can appeal the decision to the Commission if it believes the decision is unfair or contrary to the 1992 Cable Act.[337] Likewise, a decision is necessary to protect the due process rights of parties that objected to the proposed rate so that they will know the reasons why the rate was adopted. However, we will

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[333] Communications Act, § 623(a)(3)(c), 47 U.S.C. § 543(a)(3)(C).

[334] Notice, 8 FCC Rcd at 529, para. 85.

[335] See, e.g., Miami Comments at 15; Cole Comments at 6; Minnesota Comments at 18.

[336] A franchising authority may give public notice of its rate decisions in various ways, including, for example, placing such a notice on the cable system or in a local newspaper.

[337] As a related matter, the regulatory structure established by Section 623 of the Cable Act does not appear to give cable operators and franchising authorities latitude to settle rate cases. Rather, a franchising authority must follow the Commission's rate regulations and must make a reasoned decision based on the record.

not require a franchising authority to issue a written decision if it is approving a basic cable rate or rate increase in its entirety and there have been no objections. Since proposed rates or rate increases may go into effect if there is no franchise authority action by a certain date, there is no need for written decisions when a rate is being affirmatively approved without objection.

127. We also agree with those parties who believe that local authorities should have the option of providing for formal hearings or informal public meetings or written comments.[338] We again find that franchising authorities need the flexibility to structure their proceedings to the individual characteristics of their communities, consonant with the procedural requirements for other local proceedings and the particular rate issues presented. We thus believe that franchising authorities can decide for themselves whether and when to conduct formal or informal hearings as long as they act on rate cases within the prescribed time periods we have established and provide interested parties with notice and a meaningful opportunity to participate. Consequently, we will not adopt a federal rule to govern this issue.

128. The Notice solicited comment on whether we should require the cable operator, for its initial filing and any subsequently proposed rate increase, to show that its submission complies with Section 623 and our implementing regulations.[339] Of the commenters addressing this issue, both cable operators and municipalities agree that if a proposed rate increase exceeds the presumptively reasonable level, as defined by the Commission, then the burden should be on the cable operator to justify the rate increase.[340] NATOA further argues that, in all instances, the cable operators should be required to demonstrate, by a preponderance of evidence, that existing rates and all rate increases are reasonable.[341] We believe that the burden of proof should be on the cable operator to demonstrate that its initial rates for the basic service tier and accompanying equipment, or proposed increases in these rates, comply with Section 623 and our implementing regulations. This will expedite decision-making, as the operator possesses the factual information

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[338] See, e.g., Miami Comments at 14-15; NATOA Comments at 60; NY Consumer Comments at 11; Municipal Comments at 23; Connecticut Comments at 13; Austin Comments at 61-62.

[339] Notice, 8 FCC Rcd at 529, para. 84.

[340] See, e.g., NCTA Comments at 73; Minnesota Comments at 18; Caribbean Comments at 17, and NATOA Comments at 61.

[341] NATOA Comments at 61.

necessary for such a demonstration. If an initial rate or a proposed increase is presumptively reasonable under our standards, then the cable operator will merely have to show how the rate at issue meets the criteria. However, if an initial rate or a proposed increase exceeds the presumptively reasonable level, then the cable operator will have to make a cost-of-service showing to justify the proposed rate. To make this showing, a cable operator should address the various substantive elements discussed supra in this Report and Order and, once they are in effect, any rules eventually adopted pursuant to our forthcoming Further Notice of Proposed Rule Making. Furthermore, as explained infra, the filing of existing rates in excess of the Commission's presumptively reasonable level for the basic service tier, whether or not accompanied by a cost-of-service showing, could result in a prospective rate reduction or a rate prescription.

(d) Proprietary Information

129. The Notice solicited comment on rules allowing franchising authorities to obtain additional information from operators requesting a rate increase and on establishing proprietary information procedures analogous to those proposed for cable programming service complaints.[342] While both municipalities and cable operators agree that franchising authorities should be permitted to request additional information to make a rate determination,[343] they disagree about the collection of proprietary information. Municipalities contend that franchising authorities should be able to obtain any information necessary to make a rate decision, including proprietary information concerning cable programming costs or other types of financial information, as long as the franchising authorities have in place regulations, consistent with applicable law, to protect the information from public disclosure.[344] On the other hand, cable operators believe that additional information is only necessary when a proposed rate increase exceeds the Commission's reasonable standards and "then only under protective provisions limiting production of any information which identifies individual employee salaries, terms and conditions of contracts with third party vendors, and other

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[342] Notice, 8 FCC Rcd at 529, para. 85.

[343] See, e.g., NATOA Comments at 61; New Bedford Comments at 7; Thousand Oaks Comments at 25; Minnesota Comments at 18; Continental Comments at 44; and Cole Comments at 36.

[344] See NATOA Comments at 61. See also New Bedford Comments at 7; Thousand Oaks Comments at 25; and Minnesota Comments at 18.

confidential business information."[345] In other words, they believe that aggregated data should be sufficient.[346]

130. For purposes of the regulatory regime implementing the 1992 Cable Act, franchising authorities will have the right to collect additional information -- including proprietary information -- to make a rate determination in those cases where cable operators have submitted initial rates or have proposed increases that exceed the Commission's presumptively reasonable level, as defined by our regulations. Since a cable operator in those cases is asking for approval of a rate that exceeds the presumed level of reasonableness, it is necessary for a franchising authority to examine actual costs in order to make an informed determination as to the reasonableness of the proposal.[347] In cases where initial or proposed rates comply with the Commission's reasonableness standard, however, requests for additional information should relate to having an operator properly document that its prices are in accord with that standard.

131. We also believe that franchising authorities must protect confidential business information from disclosure.[348] To

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[345] Continental Comments at 44.

[346] See Cole Comments at 36.

[347] Likewise, confidential financial information may be collected and utilized to determine equipment costs.

[348] As a related matter, NATOA urges us to permit local franchising authorities to have access to rate complaints made by consumers to cable operators, even though the Commission recently held that privacy provisions in the Communications Act prohibit local franchising authorities from obtaining the names of persons making technical complaints to cable companies. NATOA contends that the privacy concerns regarding technical complaints are not applicable here, because rate complaints will not result in disclosure of a subscriber's viewing habits. See NATOA Comments at 62 n.29. We do not agree. Section 631 of the Communications Act precludes the collection and disclosure of "personally identifiable information" without a subscriber's prior consent. Since disclosure of rate complaints would result in a subscriber's name and address being revealed and since none of the exceptions to Section 631 appear to be applicable, we believe that the same approach should be taken as for technical complaints -- that is, cable operators may be required to provide the franchising authorities or the Commission aggregate data on rate complaints. No commenter has presented a persuasive argument that franchising authorities need information beyond that provided by an aggregation of rate complaint information. See Cable Television Technical

accomplish this goal, we will require franchising authorities to apply the same procedures that the Commission will apply regarding information submitted to the Commission in the cable programming services complaint process described infra.[349]

(e) Automatic Adjustments

132. The Notice also solicited comment on whether certain price changes outside the operator's control, such as increases in taxes or programming costs, should be passed through without prior regulatory review.[350] Municipalities contend that these automatic adjustments should not be allowed without prior regulatory review, because a franchising authority has a responsibility to ensure that even a rate increase imposed as a result of an event that a cable operator cannot control is reasonable.[351] By way of contrast, cable operators contend that certain exogenous costs, such as taxes and programming costs, should be allowed without prior regulatory approval because this will decrease burdens on cable operators and would avoid the possibility of operators refusing new programming that would increase their costs.[352]

Requirements (Reconsideration), 7 FCC Rcd 8676, 8681-82 (1992). Moreover, franchising authorities will likely also receive rate complaints directly from subscribers.

[349] Specifically, franchising authorities will be required to adopt procedures analogous to those contained in Section 0.459 of the Commission's Rules. Under this rule, the party submitting information must request confidentiality with respect to specific portions of the material and make a showing, by a preponderance of the evidence, that non-disclosure is consistent with the provisions of the Freedom of Information Act, 5 U.S.C. § 552. In particular, as explained in greater detail in the cable programming services section, exemption 4 of the FOIA authorizes the Commission to withhold from public disclosure confidential commercial or financial information. If a franchising authority denies a request for confidentiality, the cable operator should be able to seek review of that decision from the Commission within 5 working days, and release of the information will be stayed pending review. See generally 47 C.F.R. § 0.459.

[350] Notice, 8 FCC Rcd at 529, para. 83.

[351] See, e.g., Thousand Oaks Comments at 23-25; Connecticut Comments at 13; and NATOA Comments at 59.

[352] See, e.g., Time Warner Comments at 33; NJ Comments at 17; Caribbean Comments at 18-19; and Armstrong Comments at 28.

133. As discussed below, certain price changes beyond an operator's control can automatically be passed through to subscribers in addition to the reasonable rate. However, a franchising authority, in order to regulate rates effectively, must be apprised of such automatic adjustments in order to ensure that they are accurately calculated and justified. Consequently, we will require that a cable operator notify franchising authorities 30 days in advance of a rate increase based on automatic adjustment items. Because such exogenous costs are presumed reasonable,[353] review of these adjustments should not create an undue delay for the operator,[354] and the franchising authority must pass on them within 30 days.[355]

2. Remedies and Appeals

(a) Remedies for Unreasonable Basic Cable Rates

134. After a local franchising authority has completed its initial review of existing basic cable rates or a request for a rate increase and has determined that the rates are unreasonable, it can disapprove the existing rates or deny the rate increase. Both the Notice and the commenters suggest that various other remedies, which we will now discuss, should be available to achieve the statutory goal of ensuring reasonable rates.

135. We first must consider whether a local franchising authority, after its initial review of existing rates for the basic service tier and accompanying equipment, could order a prospective rate reduction,[356] or after its review of a

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[353] For a discussion of the types of items that qualify as external costs, see Section II.A.3(g), supra.

[354] Review of automatic adjustments by franchising authorities should be limited in scope. Such review should consist of ensuring that the item in question qualifies as an "automatic adjustment" under our rules and that the amount of the automatic adjustment is correct.

[355] In addition, even if a proposed increase exceeds the presumptively reasonable level, we will require franchising authorities to act on the portion of the increase that qualifies as an automatic adjustment within 30 days. If the franchising authority does not act upon a request for a such an adjustment within 30 days, it will go into effect automatically.

[356] We use the term "prospective rate reduction" to refer to an order by a local franchising authority to reduce or rollback existing basic cable rates that have been disapproved as

proposed rate increase, could prescribe a different rate. Municipalities contend that they must have the power to order rate reductions after their initial review of existing rates.[357] Otherwise, they claim that franchising authorities would be unable to ensure that a rate is reasonable and would be dependent upon cable operators' voluntary actions to reduce their rates to a reasonable level.[358] Likewise, municipalities believe that, after determining a proposed rate increase is unreasonable, they should have the option of either allowing a cable operator to propose a different rate or prescribing a rate that is reasonable. These commenters believe that requiring cable operators to continually refile rate requests until rate approval is achieved would be unduly burdensome and time consuming for all parties.[359] By way of contrast, cable companies contend that a franchising authority should not be allowed to designate a new rate because the Cable Act does not give them this power.[360] They believe that consumers will be adequately protected with denials of increases and/or negotiated resubmittals or settlements, as is customary at state public utility commissions.[361]

136. The first remedy that will be available to a franchising authority in conjunction with a review of rates for the basic service tier and accompanying equipment is a prospective rate reduction. Under this remedy, after a review of basic service tier and equipment rates, if a franchising authority has determined that the rates for the basic service tier or equipment exceed permitted levels, the franchising authority may order a prospective reduction of those rates to bring them into compliance with the Commission's rate standards. In addition, as will be discussed infra, reductions below the

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unreasonable to a level that is reasonable on a prospective basis only. This remedy is to be distinguished from a "refund," which is an order by a franchising authority that a cable operator make a direct payment or credit (which payment or credit may be in the form of a reduced rate) to subscribers to make them whole for the portion of past basic cable payments that have been disapproved as unreasonable. See also discussion infra at section II.A.4(b)(2).

[357] See, e.g., NATOA Comments at 64; Palm at 16-17.

[358] Id.

[359] Connecticut Comments at 13-14; NATOA Comments at 64.

[360] See, e.g., Cole Comments at 36-37; and Continental Comments at 46.

[361] Id.

permitted basic service tier rate may be ordered based upon a cost-of-service showing.

137. Contrary to the arguments of some cable operators, we find that Section 623(b)(5)(A) provides authority for state and local governments to order prospective rate reductions. That section empowers the Commission to establish "procedures by which . . . franchising authorities may enforce the regulations . . . under this subsection."[362] We believe that the power to order prospective rate reductions is necessary to assure that three goals of Section 623 are met. First, this remedy is necessary to accomplish the ultimate goal of achieving reasonable cable rates.[363] Otherwise, reductions in existing rates necessary to achieve reasonable rate levels would be solely dependent on cable operators' initiation of rate reductions. Second, this remedy accomplishes the goal, embodied in Section 623(b)(5), of expeditious resolution of disputes over basic cable rates.[364] By enabling the franchising authority to reduce existing rates prospectively to a reasonable level, a decision on rate levels can be made within the prescribed time periods, as opposed to awaiting submission of new rates by the cable operator and a determination thereon. Third, this remedy furthers the goal, set forth in Section 623(b)(2)(A),[365] of seeking to reduce administrative burdens on cable operators and franchising authorities. By ordering a rate reduction on a prospective basis, the franchising authority would eliminate the need for additional rate proceedings on the existing basic cable rates, thereby reducing administrative burdens on both the franchising authority and the cable operator.

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[362] Communications Act, § 623(b)(5)(A), 47 U.S.C. § 543(b)(5)(A).

[363] Section 623(b)(1) states that "[t]he Commission shall, by regulation, ensure that the rates for the basic service tier are reasonable. Such regulations shall be designed to achieve the goal of protecting subscribers of any cable system that is not subject to effective competition from rates for the basic service tier that exceed the rates that would be charged for the basic service tier if such cable system were subject to effective competition."

[364] Section 623(b)(5)(B) mandates that these regulations shall include "procedures for the expeditious resolution of disputes between cable operators and franchising authorities concerning the administration of such regulations."

[365] Section 623(b(2)(A) provides that in implementing this section, "the Commission shall seek to reduce the administrative burdens on subscribers, cable operators, franchising authorities, and the Commission."

138. The second remedy that will be available to a franchising authority is a rate prescription. This remedy may be utilized whenever a franchising authority determines that a proposed rate for the basic service tier or associated equipment is unreasonable. Under this remedy, a franchising authority may prescribe a reasonable rate in place of the proposed unreasonable rate. Or, the franchising authority could disapprove a proposed rate but establish a level to which the franchising authority would not object if the proposal were resubmitted. The prescribed rate may not be lower than the Commission's permitted rate, as determined using our benchmark scheme, unless the operator has sought to justify the proposed basic service tier rate by a cost-of-service showing. If the operator has submitted such a cost-of-service showing, a franchising authority could reduce an operator's rate for the basic service tier to a level below the Commission's permitted rate level. The rationale for this approach is that if a cable operator has sought to justify a rate in excess of the permitted level based upon its actual costs, and if the costs in question justify a level below the permitted level, the franchising authority should be able to order a prospective rate reduction to the lower level, since the facts prove that to be the reasonable rate level for that cable system.

139. We believe that rate prescriptions are permitted under Section 623(b)(5)(B) of the Cable Act because it is an effective way of ensuring that all regulated rates are reasonable. Further, the ability to prescribe rates will also promote the goals of seeking expeditious resolution of ratemaking disputes and reducing administrative burdens on cable operators and franchising authorities because it lessens the need for subsequent ratemaking proceedings. However, we recognize that prescribing a rate is different from merely denying a rate because it involves not only determining that the proposed rate is unreasonable but also establishing a rate that is reasonable. By analogy, Section 205 of the Communications Act, as well as court decisions, require the Commission to do more substantively when it prescribes rates for common carriers.[366] Accordingly, we believe that, where an operator submits a rate that exceeds the maximum permitted level as defined by the Commission's rate standards, a franchising authority may prescribe a rate different from the proposed rate provided that, after giving the operator an opportunity to participate, the franchising authority's

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[366] See Communications Act, § 205, 47 U.S.C. § 205. See also Nader v. FCC, 520 F.2d 182 (D.C. Cir. 1975) (denial of a rate increase and prescription of different rate upheld where record shows that proposed rate was unreasonable and prescribed rate was reasonable).

written decision affirmatively demonstrates why the proposed rate is unreasonable and why the prescribed rate is reasonable.[367]

140. The third remedy we must consider is whether and when a franchising authority can order refunds to subscribers. Franchising authorities contend that they must have the power to order refunds to ensure that basic rates are reasonable.[368] They allege that such power is not prohibited by the 1992 Cable Act and that it could be useful in situations such as where a cable operator imposes a rate increase without approval and the franchising authority later determines that such rate increase is not reasonable.[369] Some of these municipalities also allege that franchising authorities should not be required to obtain an order from a court or other governmental entity in order to order refunds.[370] However, one of these commenters asserts that, prior to the issuance of any order for refunds, the local franchise authority should provide basic due process to the cable operator through a formal hearing or written submission so that the cable operator is able to respond to specific alleged violations.[371] On the other hand, some cable operators contend that there is no authority under the 1992 Cable Act for permitting franchising authorities to order refunds. In support of this position, they note that the 1992 Cable Act specifically authorizes refunds for unreasonable rates charged for cable programming services but does not contain any similar language regarding basic cable rates. They assert that this omission reflects a Congressional intent not to permit local franchise authorities to order refunds for basic cable rates.[372]

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[367] A formal, evidentiary hearing need not be held; it would be sufficient for a franchising authority to conduct a paper hearing in which the cable operator would have an opportunity to respond to the franchising authority's concerns about the reasonableness of the rate proposed. We reiterate that there must be record support to justify the rate as reasonable. Moreover, the franchising authority must complete this process within the time periods we have established for review of rates in order to avoid having the rate go into effect.

[368] See, e.g., NATOA Comments at 65, Miami Comments at 16; Minnesota Comments at 19.

[369] See NATOA Comments at 65; Austin Comments at 58.

[370] Minnesota Comments at 19; Miami Comments at 15.

[371] Miami Comments at 15.

[372] See, e.g., Nashoba Comments at 93; Adelphia Comments at 94. By way of contrast, some cable interests acknowledge that franchising authorities may order refunds. See, e.g., Cole

141. We believe that refunds for unreasonable basic service tier and equipment rates are available pursuant to our authority under Section 623(b). Subsection (b)(1) gives the Commission broad rulemaking power to "ensure that the rates for the basic service tier are reasonable." Requiring cable operators to refund unreasonable basic service tier rates effectuates this statutory directive. Moreover, since cable operators will be on notice of the Commission's reasonableness standards, and are free to lower their rates to a reasonable level, we perceive no unfairness in requiring refunds.[373] Also, we do not believe that the Cable Act's explicit reference to refund authority regarding cable programming service rates and the omission of similar language regarding basic cable rates bars refunds of unreasonable basic service tier rates. The absence of a requirement need not be construed as a prohibition. Further, Section 623(b)(5)(A) of the Cable Act gives the Commission wide discretion to adopt procedures so that franchising authorities can enforce reasonable rates.[374] Therefore, in the exercise of our rulemaking power, franchise authorities will be able to order refunds.

142. While we believe that the remedy of ordering refunds is available to franchising authorities, it is not an unlimited power. Rather, we envision that it would be used mainly in three situations. First, if a cable operator failed to comply with a rate decision and continued to charge unreasonable rates, we believe that a franchising authority should be able to

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Comments at 35 (under two-step approach, rate increases would go into effect after 30 days subject to refunds if later found to be unreasonable).

[373] See also Communications Act, 4(i), 47 U.S.C. § 154(i).

[374] Some commenting parties also contend that the 1992 Cable Act does not and cannot grant franchising authorities the power to order refunds or set rates because such powers are matters of state, as opposed to federal, law. See Time Warner Reply Comments at 37; see also TCI Comments at 52-53. We disagree. Once a franchising authority has demonstrated to the Commission that it has the jurisdiction and the ability to engage in rate making in compliance with the 1992 Cable Act, we believe that it may be permitted to use the remedies which are an essential part of the ability to regulate rates effectively. However, we do recognize that, if a franchising authority does not have jurisdiction under state or local law to engage in rate regulation, then it would not be able to be certified by the Commission. Under those circumstances, as discussed supra, the Commission would have to undertake local regulation itself and order refunds, where appropriate. Communications Act, § 623(b)(5)(A), 47 U.S.C. § 543(b)(5)(A).

:rder refunds back to the effective date of its rate order. Second, as part of its initial review of existing rates, a franchising authority will have the discretion to order refunds for unreasonable rates that exceed the permitted levels and are not supported by a persuasive cost-of-service showing by the operator. The permissible refund period commences on the date the cable operator implements a prospective rate reduction and goes back in time to the effective date of our rules in this proceeding or one year, whichever is shorter. We believe that this cap on a cable operator's refund liability for initial review of rates is necessary because some franchising authorities may request and become certified well into the future, thereby potentially exposing an operator to a refund liability for several years that could affect the viability of the cable system. Third, if a franchising authority has tolled a proposed rate increase for 90 or 150 additional days and has not completed its review by the end of these time periods, the proposed rates can go into effect subject to a refund (if portions of the rates are later found to be unreasonable). As explained supra, a franchising authority would issue a brief order when the tolled rates go into effect, requesting the operator to keep accurate account of all amounts paid and on whose behalf such amounts are paid.[375] The permissible refund period commences on the date the franchising authority releases its accounting order and ends on the date the cable operator implements a prospective rate reduction ordered by a franchising authority or one year, whichever is a shorter time period.[376]

143. In ordering a refund, a franchising authority must afford a cable operator due process by giving it notice and

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[375] We believe that accounting orders can be issued by franchising authorities for essentially the same reasons that they can order refunds -- that is, both remedies further the goal of Section 623(h) of ensuring that "the rates for the basic service tier are reasonable." Also, since cable operators will benefit from tolled rates going into effect prior to issuance of decisions, it is not unreasonable for the operators to account for payments made until a written decision is rendered by a franchising authority.

[376] Similarly, if a franchising authority has taken more than the 90 or 180-day period to complete its initial review of cable operator's rates, refund liability will still be limited to one year. The refund period will be calculated from the date of the accounting order to the point a prospective rate reduction is issued, and then back in time from the date of the accounting order to the effective date of our rules, or to the point where the total refund period would equal one year, whichever is less.

opportunity to participate before refunds may be ordered.[377] As to the mechanics of making refunds, we believe that franchising authorities should follow the procedures which we are adopting for refunds for cable programming services.[378] We also believe that the refunds should include interest, computed at the applicable published Internal Revenue Service rates for tax refunds and additional tax payments.[379]

144. The fourth remedy we must consider is whether a franchising authority could impose fines or other sanctions under local law. The municipalities that addressed this issue contend that a franchising authority should be able to impose fines or other sanctions for violation of its rate decision, so long as they are not irreconcilable with the Commission's remedies.[380] On the other hand, cable operators ask that the Commission prohibit franchising authorities from imposing punitive sanctions such as fines, because they are afraid that they will be penalized for merely seeking higher rates, which is not a violation of law.[381]

145. While a franchising authority may have other remedies available under local law (such as the power to assess fines for violations of rate regulations), Section 623 of the Cable Act requires that local regulation and enforcement of basic cable rates be within the guidelines set forth by the Commission. In exercising our authority under Section 623(b)(5)(A) to establish enforcement guidelines, we do not believe that it is necessary for franchising authorities to utilize punitive

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[377] Franchising authorities would not have to conduct formal, evidentiary hearings but could conduct paper hearings based upon written submissions from the cable operators.

[378] As explained in greater detail in Section , where the operator can without undue burden identify actual subscribers who paid the unreasonable charge, we encourage the operator to do so by refunding the overage specifically to those subscribers. However, it may be difficult or impossible in many cases to identify the subscribers who paid the unreasonable rates so that the expense of identifying the exact parties eligible for a refund might be disproportionately large in comparison to the individual refunds themselves. Thus, the operator has the option of implementing the refund through a one-time credit issued to the class of subscribers that was charged the unreasonable rate. See Section II.A.4(b)(2), infra.

[379] See also section II.A.4.(b)(2), infra.

[380] See, e.g., NATOA Comments at 63; NYSCT Comments at 25.

[381] See, e.g., Continental Comments at 46; Cole Comments at 37.

sanctions such as fines or forfeitures for violations of rate regulations and we are, therefore, preempting local laws to the extent that they may permit the use of such sanctions. For example, if a cable operator's existing rates for the basic service tier or accompanying equipment were determined by a franchising authority to violate Section 623 of the Cable Act or our implementing rules, we do not believe that such a determination warrants a fine or forfeiture. Likewise, if a cable operator submits a proposed increase in its rates for the basic tier or accompanying equipment that exceeds the Commission's reasonable rates and they are disapproved, this should not result in a monetary sanction. We believe that the other remedies that we are making available to franchising authorities -- such as the power to order refunds or prescribe rates -- should be sufficient to achieve the statute's goal of ensuring reasonable basic cable rates and equipment costs.[382] Further, as Congress stated in the context of cable programming services, "[a] finding that rates are unreasonable is not to be deemed a violation of law subject to the penalties and forfeitures of the Communications Act. Compliance with a Commission order to reduce rates shall be deemed compliance with applicable law."[383] We believe that the same rationale should apply with respect to basic cable rates -- that is, a determination that either existing rates or a request for an increase is unreasonable is not a violation of law and does not warrant punitive action by a franchising authority.

(b) Forum for Appeals of Local Authorities' Decisions

146. Once a franchising authority issues a rate decision, interested parties, including the operator, may wish to appeal it. The Notice sought comment on whether the local courts or the Commission would be the appropriate forum for such appeals.[384] Most commenters, including municipalities and cable operators, agree that the Commission should review local franchising authorities' decisions, because this would promote uniformity of interpretation and would expedite appeals and because the Commission has greater expertise than the courts on

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[382] However, of course a cable system could be liable for violation of a rate decision specifically directed at the cable operator by a franchising authority. For example, if a cable operator did not comply with a refund order by the franchising authority, the franchising authority could order monetary forfeitures if it possesses such power under local law.

[383] House Report at 88.

[384] Notice, 8 FCC Rcd at 529, para. 87.

the issues involved.[385] Some of these parties also contend that Section 623(a)(5) of the Cable Act specifically requires the Commission to review local rate decisions.[386] By way of contrast, a few parties contend that appeals should be taken to local courts for the convenience of cable operators and to avoid excessive administrative burden on the Commission.[387]

147. We believe that the Commission should be the sole forum for appeals of local decisions on rates for the basic service tier and accompanying equipment involving whether or not a franchising authority has acted consistently with the Cable Act or the rules adopted thereunder and are, therefore, preempting any state cause of action dependent upon such determinations.[388] The Cable Act in general and Section 623 in particular establish a scheme of regulation of cable rates based on federal guidelines, and Section 623(b)(5)(B) explicitly mandates that the Commission adopt regulations which include "procedures for the expeditious resolution of disputes between cable operators and franchising authorities concerning the administration of such regulations."[389] In discharging our obligation to adopt these

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[385] SD Comments at 4; NASHOBA Comments at 92-93; Newhouse Comments at 36-37; NATOA Comments at 66-67; Falcon Group Comments at 53-55; Caribbean Comments at 20-21; Cole Comments at 37-38; CFA Comments at 157-158; Miami Comments at 16; Minnesota Comments at 19; Adelphia Comments at 93.

[386] See Caribbean Comments at 20-21; Cole Comments at 37-38; TCI Comments at 57-58; Comcast Comments at 21.

[387] See, e.g., Connecticut Comments at 13; see also NYSCCT Comments at 11 (state agency should be forum for appeals).

[388] Appeals of local rate decisions that do not depend upon determining whether a franchising authority has acted consistently with the Cable Act or the Commission's Rules could be heard in state or local courts. For example, a state court could hear an appeal on whether a franchising authority complied with its local procedures on pleading cycles or hearings or whether there has been a breach of contract between a franchising authority and a cable operator.

[389] While we believe that we have the authority to preempt state court appeals of local rate decisions, we do not find, as suggested by some parties, that this is explicitly provided in Section 623(a)(5) of the Cable Act. That section specifically requires the Commission to entertain petitions by a cable operator or other interested parties seeking revocation of a franchising authority's certification to regulate basic cable rates for acting inconsistently with the statute or the Commission's guidelines for basic rate regulation. It does not address the issue of routine

procedures, we believe that Commission review of appeals is necessary to ensure uniformity of interpretation of these federal guidelines. Otherwise, rulings by state or local courts in different parts of the country could produce varying and conflicting determinations about Section 623 and our rules which could frustrate the purpose of having federal guidelines.[390] Furthermore, even without Congress' explicit grant of authority to the Commission to adopt procedures for appeals of local rate decisions, we believe that we would still have the authority to require Commission review of appeals because, under the Supremacy Clause of the Constitution,[391] a federal agency acting within its delegated authority may preempt state laws "to the extent it is believed that such action is necessary to achieve its purposes."[392] Consequently, we will exercise exclusive jurisdiction over appeals of local rate decisions involving whether the franchising authority has acted inconsistently with the Cable Act or our implementing rules.[393] Appeals must be

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appeals of local ratemaking decisions, although it does state that if we find that a franchising authority has acted inconsistently with the statute, "the Commission shall grant appropriate relief." We believe that an appeal of an authority's decision is a more appropriate procedure for handling disputed rate cases than a revocation proceeding. As a result, if a party desires to contest a local rate decision, it should, in the first instance, file an appeal with the Commission under Section 623(b)(5)(B) of the Cable Act, and not a petition for revocation of a franchising authority's certification. Of course, should an authority fail to abide by our determination on appeal, the remedy of revocation would lie.

[390] See, e.g., Lowest Unit Charge, 6 FCC Rcd 7511 (1991), recon. denied, 7 FCC Rcd 4123 (1992), petition for review docketed sub nom. Zell Miller v. FCC, No. 92-8777 (11th Cir., filed August 11, 1992) (any state cause of action dependent on any determination of the lowest unit charge under Section 315(b) of the Communications Act is preempted by federal law to achieve purpose of uniform standards).

[391] U.S. Const., art. VI, cl. 2.

[392] City of New York v. FCC, 486 U.S. 57, 63 (1988), quoting, Louisiana Public Service Comm'n v. FCC, 476 U.S. 355, 369 (1986) (Commission preemption of local regulation of cable technical standards affirmed).

[393] We delegate authority to the Commission staff to decide appeals of local rate decisions so that they may be resolved more expeditiously. See 47 C.F.R. § 0.201 et seq. However, such staff decisions would be subject to review by the full Commission and, thereafter, by the courts. See 47 C.F.R. § 1.115; 47 U.S.C. § 402(a); 28 U.S.C. § 2344. See also 47 C.F.R. § 1.106.

filed within 30 days of the date a franchising authority releases to the public the text of its rate decision as computed under Section 1.4(b) of our Rules.[394] Oppositions can be filed within 15 days after the appeal is filed and must be served on the party appealing the rate decision. Replies can be filed within 7 days after the last day for filing oppositions and shall be served on the parties to the proceeding.[395]

148. Contrary to the view of NATOA, we do not agree that Section 623(b)(5)(B) of the Cable Act permits only a cable operator to challenge a rate decision.[396] Although this section requires the Commission to establish " . . . procedures for the expeditious resolution of disputes between cable operators and franchising authorities concerning the administration of such [basic cable rate] regulations," there is no explicit language in this section or in the legislative history to indicate that subscribers or other interested parties who participated in the proceeding could not file an appeal. Indeed, such a result is inconsistent with the section's goal of providing an opportunity for interested parties to participate in local rate proceedings. Since interested parties such as subscribers have standing to participate in rate proceedings at the local level, it follows that they should be permitted to file an appeal with the Commission if they participated at the franchising authority level and believe that the decision is wrong.

149. We also believe that the Commission should not conduct de novo review of local rate decisions and that the standard of review should be to determine whether there is a reasonable basis for the franchising authority's written decision. Since the Commission is in effect acting like an appellate court in such instances, it is appropriate to use the same standard of review -- that is, the Commission will defer to the judgment of the local franchising authority provided that there is a rational basis for the decision. This approach will

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[394] For the purpose of calculating the time period for filing appeals under Section 1.4 of the Commission's Rules, the first day to be counted is the day after the franchising authority releases to the public the text of its rate decision. It is immaterial whether the first day is a holiday (i.e., a Saturday, Sunday, or federally recognized holiday). An appeal of a local rate decision must be filed at the Commission by the close of business of the 30th day. If the 30th day falls on a holiday as defined above, the appeal must be filed on the next business day. See 47 C.F.R. § 1.4.

[395] Cf. 47 C.F.R. § 1.115(d) (pleading cycle on applications for review).

[396] See NATOA Comments at 66 n.34.

not only expedite review but also be less burdensome on our administrative processes. Furthermore, we believe that the jurisdictional framework of the 1992 Cable Act prohibits us, during appeals where a franchising authority is still validly certified, from establishing rates different from the franchising authority. In such circumstances, the Act only permits our direct regulation of rates in cases where a franchising authority's certification was revoked or disallowed.[397] As a result, if there is no rational basis for the rate decision, we will remand the case to the franchising authority with instructions on how to make the result accord with Section 623 of the Act and our guidelines for determining reasonable rates.[398]

(3) Notification of Availability of Basic Tier

150. In order to ensure that subscribers are adequately notified of the availability of basic tier service, the Notice proposed to require that operators provide written notice of such availability to existing subscribers within 90 days or three billing cycles from the effective date of the Commission's rules governing rate regulation. The Notice further proposed to require that such information be included in any sales information distributed prior to installation and hook up and at the time of installation.[399] We also sought comment on the appropriate form and content of such notice.

151. Although most of the commenting parties agree with the 90-day/three billing cycle notification,[400] some parties favor an exemption for those cable operators who can demonstrate that they have made notification in the twelve months prior to

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[397] See Communications Act, § 623(a)(6), 47 U.S.C. 543(a)(6).

[398] We recognize that appeals of local rate decisions involving cost-of-service showings may be filed prior to our resolution of the Further Notice of Proposed Rule Making on cost-of-service standards. Until we adopt final cost-of-service standards, rate decisions that are appealed to the Commission will be reviewed using general cost-of-service principles. Cable operators who believe that they have been aggrieved by the local franchising authorities' decision may request a stay of that decision from the Commission. However, such stays will be evaluated under the strict standards normally accorded requests for stay, and will not be routinely granted.

[399] Notice, 8 FCC Rcd at 530, para. 89.

[400] See, e.g., GTE Comments at 19 and TCI Comments at 57; but see Dover Comments at 22-23 (supporting a monthly notification requirement printed directly on the cable bill).

the effective date of the rate regulations.[401] In addition, NYSCCT asks that the Commission not preempt similar local notification requirements. NYSCCT also recommends a requirement that a cable operator maintain a public file of copies of the notifications it sent to subscribers.[402] Some commenters oppose including the required basic notification at or prior to installation,[403] while TCI opposes an annual notification requirement, claiming that notification of basic service availability upon initial subscriber sign-up should be sufficient to inform the cable subscriber.[404]

152. We believe that cable operators should notify subscribers of the availability of basic tier service within 90 days or three billing cycles from the effective date of the rules adopted in this proceeding and should similarly notify new subscribers at the time of installation.[405] However, cable operators who can demonstrate that they have satisfied the notification requirement in the twelve months prior to the effective date of the cable regulations will be exempt from the initial notification requirement, provided that their notice conforms to the format and content requirements we establish. We believe that this approach offers the best balance between the public's right to know about the availability of a basic service option, and the need to minimize the administrative burden on cable entities.[406] We agree that such notification should be

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[401] See Continental Comments at 48; Cole Comments at 38-39.

[402] NYSCCT Comments at 26.

[403] See Continental Comments at 48; Cole Comments at 38-39; but see Minnesota Comments at 18 (supporting a requirement for such notification to be included in any sales information distributed prior to hookup and at the time of installation).

[404] TCI Comments at 57.

[405] If the cable operator is required to notify subscribers about additional receiver connections and the need for additional equipment to view all must carry stations pursuant to Section 76.56(d)(3) of the Rules, this notification may also include the notice of basic tier availability described above. See 47 C.F.R. § 76.56(d)(3).

[406] To the extent that this notification requirement for basic tier availability conflicts with local franchise agreements or rules, we are preempting local regulations. Section 623(b)(5)(D) requires that the Commission adopt rules in this area in order to ensure that subscribers are notified of the availability of basic tier service. Any further local regulations would appear to be inconsistent with Section 623(b)(2)(B), which requires that we

included with the cable bill so that it is not lost in promotional material.[407] We also have been persuaded by cable operators that it is not feasible to require that this notice of basic tier availability be included in all sales literature prior to installation and hook up because much of this promotional material is beyond the control of the cable operator. However, it must be given to a new subscriber at the time of installation.

153. We also do not believe that the form and content of this notification should be left to the discretion of local franchising authorities. On the contrary, Section 623(b)(6) explicitly requires the Commission to adopt procedures on notification of basic tier availability. The legislative history of this section further states that the Commission is directed to adopt both "standards and procedures to assure that subscribers receive notice of the availability of the basic service tier."[408] We interpret this language to require some type of federal standard as to the form and content of the notification. Accordingly, we will require that cable operators not only state that a basic tier service is available but also set forth the price of the service and list the services that are included. This notification should be in a written form which "clearly and conspicuously" informs the subscriber of the above information in a manner similar to the annual privacy act disclosures of Section 631 of the Communications Act.[409] Finally, although we are not adopting a requirement that a cable company maintain in its public inspection file copies of its notifications of basic service availability, if challenged, the cable company will bear the burden of proving that it is in compliance.

c. Regulation of Basic Service Tier Rates and Equipment

(1) Components of the Basic Service Tier Subject to Regulation

(a) Introduction

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avoid administrative burdens on cable operators and franchising authorities. Moreover, the adoption of different local standards would make it difficult for an MSO to develop a single billing insert which could economically be used across all franchise areas.

[407] See Dover Comments at 22-23.

[408] House Report at 85.

[409] Communications Act, § 631(a), 47 U.S.C. § 551(a).

154. Statutory requirements. The Cable Act requires each operator to offer its subscribers a separately available basic service tier to which subscription is required for access to "any other tier of service."[410] The statute requires this basic tier to include: (1) all local commercial and noncommercial educational television and qualified low-power station signals carried to meet carriage obligations imposed by Sections 614 and 615 of the Cable Act; (2) any public, educational, and governmental access programming required by the franchise to be provided to subscribers; and (3) any signal of any television broadcast station that the cable operator offers to any subscriber, unless it is a signal that is secondarily transmitted by a satellite carrier beyond the local service area of such a station.[411] Section 623(B)(7)(B) permits the operator to include additional video programming signals or services in the basic tier, as long as the charges for their services conform to our basic rate regulations. Qualified franchising authorities are to be the primary regulators of rates for this basic tier of service, with the Commission regulating only in certain circumstances.

(b) General Requirements

i. Background

155. The statute requires that "must-carry" local television signals, as defined by Section 614 and 615 of the Communications Act, must be included in the basic service tier. In the Notice we sought comment on the tentative conclusion that Section 623(b)(7)(A)(iii) makes any local signal qualified for must-carry status but carried pursuant to retransmission consent a basic tier channel. We also asked parties to address whether retransmission consent channels would be classified as mandatory basic service channels if an operator had satisfied his signal carriage obligations with the carriage of other stations. Finally, we also sought comment on the tentative finding that operators may add any number of programming services to the basic tier, provided that such services are subject to rate regulation.[412]

ii. Comments

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[410] Communications Act, § 623(b)(7)(A), 47 U.S.C. § 543(b)(7)(A).

[411] Communications Act, § 623 (b)(7)(A), 47 U.S.C. § 543(B)(7)(A).

[412] Notice, 8 FCC Rcd at 513.

156. Most commenters agree with our tentative conclusion that any local signal, whether carried pursuant to must-carry or retransmission consent and regardless of whether the cable operator has satisfied signal carriage obligations, must be placed on the basic tier.[413] Others, however, argue that whether a retransmission consent channel is carried on basic or on another tier should be a matter for negotiation between the cable operator and the broadcaster.[414] Finally, commenters agree that operators may add any number of programming services to the basic tier and that such services would be subject to rate regulation.[415]

iii. Discussion

157. We find that any domestic television broadcast signal carried by a cable operator must be placed on the basic tier, whether the channel is must-carried or carried pursuant to retransmission consent. Section 623(b)(7)(A) requires "any signal of any television broadcast station that is provided by the cable operator to any subscriber" to be carried on the basic tier (emphasis supplied). The only exception is signals "secondarily transmitted by a satellite carrier beyond the local service area of such station."[416] There are no exceptions for

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[413] See, e.g., Time Warner Comments at 12; Miami Comments at 6-7.

[414] See, e.g., Cole Comments at 8; NYSCCT Comments at 13.

[415] See, e.g., Nashoba Comments at 14-15; NAB Comments at 11; Cole Comments at 10; Austin Comments at 21.

[416] Nashoba and The Falcon Group urge the Commission to clarify that "superstations" may be carried on a tier other than the basic tier even if the cable system receives the signals by microwave and not by satellite. See Nashoba Comments at 20-21; The Falcon Group Comments at 11-12. We adopt this clarification. Section 623(b)(7)(A)(iii) excepts from required carriage on the basic tier broadcast signals "secondarily transmitted by a satellite carrier beyond the local service area of such station." The statute thus defines the excepted signals by how they are transmitted, not by how a particular cable system receives them. Moreover, it is clear that Congress intended that superstations not be required basic tier channels outside of their local market coverage area. See Conference Report at 64 (deleting requirement in House amendment that superstations be carried on the basic tier). A superstation does not become a local broadcast station simply because a cable system receives it by microwave. It would frustrate congressional intent to require a cable operator to carry superstations on the basic tier simply because that operator actually receives the signals by microwave.

signals transmitted pursuant to retransmission consent or for additional broadcast signals carried beyond the operator's must-carry requirement. The components listed in the statute, however, are specifically labelled "minimum contents." Section 623(b)(7)(B) clearly states that a cable operator may add additional video programming signals or services to the basic tier, with those additional services subject to basic tier rate regulation.

158. Two commenters raise issues with respect to PEG channels. Nashoba argues that only PEG channels actually carrying PEG programming should be required to be on the basic tier. Nashoba reasons that Congress required that PEG channels be included on the basic tier to promote the availability of educational and governmental programming at the lowest reasonable rate. Moreover, Nashoba notes that franchising authorities must provide procedures to permit operators to use for other programming those designated PEG channels not being used to provide PEG programming.[417] We agree with Nashoba that only those PEG channels actually used for PEG programming must be carried on the basic tier. The congressional purpose--to provide all subscribers access to channels carrying PEG programming--would not be effectuated by requiring a cable operator to "load up" the basic tier with channels designated, but not used, for PEG programming. If any portion of the channel is used for PEG programming, however, the channel must be carried on the basic tier unless if, as we discuss below, the franchising agreement explicitly permits carriage on another tier. A cable operator carrying such a channel on other than the basic tier (unless pursuant to a franchise agreement) will be required to move that channel to the basic tier immediately should that channel begin to carry any PEG programming.

159. Nashoba and the Falcon Cable Group argue that the Commission should not require placement of PEG channels on the basic tier unless the franchising agreement so requires.[418] NATOA contends that we should allow franchising authorities to require placement of PEG channels on other than the basic tier.[419] All of these parties base their arguments on the House Report language, which states that "it is not the Committee's intent to modify the terms of any franchise provision either requiring or permitting the carriage of such programming on a

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[417] Nashoba Comments at 21-22 (citing Communications Act, § 611(d)(1), 47 U.S.C. § 531 (d)(1)).

[418] Nashoba Comments at 22; the Falcon Cable Group Comments at 12-13.

[419] NATOA Comments at 69.

tier of service other than the basic service tier."[420] The House Report then discusses at some length the importance of providing all cable subscribers access to PEG channels.

160. We decline to adopt the interpretation urged by Nashoba and Falcon, which would allow a cable operator to carry PEG channels on a non-basic tier unless the franchising authority required carriage on the basic tier. We agree with NATOA, however, that franchising authorities may require carriage of PEG channels on a non-basic tier. Thus, if a franchise agreement is silent as to the tier on which PEG channels must be carried, the cable operator must carry them on the basic tier. The statutory language states that PEG channels required by the franchising authority to be provided to cable subscribers must be carried on the basic tier; the legislative history states only that the Committee did not intend to modify specific provisions in the franchise agreement regarding placement of PEG channels on non-basic tiers. Given this clear congressional direction and the evidence of the importance attached to PEG channels, we require a cable operator to carry PEG channels on the basic tier unless the franchising agreement explicitly permits carriage on another tier.

161. Finally, NATOA argues that the Commission should not preempt franchise provisions governing the number of channels that must be on the basic tier, or provisions in franchises entered into before 1984 that require cable operators to place particular programming services on the basic tier.[421] Certain cable operators disagree.[422] Time Warner, for example, argues that under "a new regulatory regime which directly constrains the rates for a specific set of services in order to promote localism, cable operators should not be bound by anachronistic requirements for a 'fat' basic tier."[423] We agree with Time Warner that the statutory definition of the basic service tier preempts provisions in franchise agreements that require additional services to be carried on the basic tier. First,

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[420] House Report at 85. The House provision was enacted into law, so the House Report is relevant in determining congressional intent.

[421] NATOA Reply Comments at 22. Several state attorneys general argue that cable operators should be required to offer as a "basic tier" a set of services comparable to that offered on January 1, 1992. AG Comments at 11. For reasons discussed in this paragraph, we decline to impose such a requirement.

[422] See, e.g., Time Warner Comments at 13; Continental Comments at 71.

[423] Time Warner Comments at 13.

Congress clearly envisioned that broadcast "superstations" could be carried on a non-basic tier because the Act specifically exempts superstations from the requirement that all broadcast channels be carried on the basic tier.[424] This is evidence that Congress intended to limit the number of channels that cable operators could be required to carry on the basic tier newly subjected to local rate regulation. Second, the House Report specifically discusses the Committee's intent that franchise provisions requiring or permitting carriage of PEG channels on other than the basic tier were not intended to be preempted.[425] Had the Committee, whose provision on the composition of the basic tier was substantially enacted into law,[426] not intended to preempt provisions in franchise agreements specifying the contents of the basic tier, there would have been no need for the Report language on the specific question of PEG channels.[427] We thus do not believe that franchising authorities, with the exception of PEG channels discussed above, have the authority under the Act to require carriage on the basic tier of channels other than those set forth in the statute. Any other interpretation would permit local authorities to overrule the federal-state division of jurisdiction enacted by Congress.

(c) Buying-Through Basic Service to Other Tiers

i. Background

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[424] Communications Act, 623(b)(7)(A)(iii), 47 U.S.C. 543(b)(7)(A)(iii).

[425] House Report at 85.

[426] The only change from the House language that the Conference Committee made was to delete the requirement that superstations be carried on the basic tier. Conference Report at 64.

[427] Moreover, the Conference Report states that the basic tier must contain the signals required by Section 623(b)(7)(A) as well as "other video programming signals that the cable operator may choose to provide on the basic tier." Conference Report at 60 (emphasis added). This indicates that Congress intended to leave the composition of the basic tier beyond the minimum specified in the Act to the choice of cable operators. We also agree with Nashoba that the Act's preemption of local franchise control over the contents of basic service reflects a balance among competing interests: franchising authorities were given greater regulatory authority over basic service rates and cable operators were given greater discretion over the content of their basic service. Nashoba Comments at 14.

162. The statute defines basic service as a tier "to which subscription is required for access to any other tier of service."[428] The Notice sought comment on whether this provision precludes the offering of video services completely "a la carte" and without prior subscription to the basic service tier. Given the language of the statute which limits any "basic buy through" to other tiers of service, the Notice also asked whether Congress intended to permit consumers to purchase single-channel services on a stand-alone basis. The Notice also sought comment on whether the Act would preclude subscribers from purchasing a separate offering of a nonvideo or "institutional network" without first purchasing the basic tier.[429] The Notice also tentatively interpreted Section 623(b)(8)(A) as preventing an operator from requiring any purchase other than the basic tier as a condition for ordering other programming.

ii. Comments

163. Cable operators and Austin, Texas et al. argue that nothing in the Act requires cable subscribers to purchase the basic tier in order to receive programming on a per-channel or per-program basis or to obtain institutional network offerings, digital cable radio, interactive services, or non-video services.[430] These commenters reason that this interpretation comports with congressional intent not to regulate per-program and per-channel offerings and not to inhibit cable operators' ability to compete with distributors that offer such programming.[431] Additionally, these commenters note, this interpretation maximizes consumer flexibility and choice, a policy that underlies the Act.[432]

164. Broadcasters contend that any consumer who subscribes to the cable system for any purpose must subscribe to the basic tier. NAB bases its conclusion on Section 614(b)(7) of the Act, which states that must-carry signals "shall be provided to every subscriber of a cable system." Since must-carry signals must be on the basic tier, NAB reasons, it follows that all subscribers

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[428] Communications Act, § 623(b)(7)(A), 47 U.S.C. § 543(b)(7)(A).

[429] Notice, 8 FCC Rcd at 513-14.

[430] See, e.g., Cole Comments at 9; TCI Comments at 24-27; Austin, Texas, et.al Comments at 21.

[431] See, e.g., Cablevision Reply Comments at 38-39; TCI Reply Comments at 49.

[432] See, e.g., Cox Comments at 88-89; Sommerville Comments at 7; TCI Reply Comments at 47.

must take the basic tier.[433] INTV agrees that all subscribers must take the basic tier; it argues that without such a requirement, a cable operator could avoid offering a basic tier simply by offering services a la carte.[434]

iii. Discussion

165. In examining the Act's language and legislative history, we find that Congress intended to require subscribers to purchase the basic tier in order to gain access to any video programming, including that offered on a per-program or per-channel basis. Section 623(b)(7)(A) states that each cable operator "shall provide its subscribers a separately available basic service tier to which subscription is required for access to any other tier of service." While a literal reading of this provision could lead to the conclusion, as some commenters urge, that purchase of the basic tier is not required for access to pay-per-view or per-channel programming, this subsection must be read in conjunction with other provisions in the Act. We interpret the anti-buy-through provision (Section 623(b)(8)(A)), which prohibits a cable operator from requiring a subscriber to purchase any other tier besides the basic tier as a condition for purchasing programming offered on a per-channel or per-program basis, as mandating purchase of the basic tier for access to per-channel or per-program offerings.[435] House Report language in

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[433] NAB Comments at 8-9.

[434] INTV Reply Comments at 1-6.

[435] Cox disagrees with our tentative conclusion in the Notice that Section 623(b)(8)(A) precludes cable operators from requiring the purchase of services in addition to the basic tier as a condition for ordering any other programming. Cox argues that cable operators should be permitted to offer a tier of cable programming services conditioned on the purchase of another tier of cable programming services. Cox Comments at 87. We agree. Section 623(b)(8)(A) of the Act only precludes operators from conditioning access to programming offered on a per-channel or per-program basis on purchasing intermediate tiers. See also House Report at 85 (repeating the provision's plain meaning). In the absence of some indication that Congress intended us to depart from the literal meaning, we decline to do so.

The New York State Commission on Cable Television argues that one channel can be a "tier." NYSCCT Comments at 13. We disagree. The general framework of the Act distinguishes programming offered on a per-channel or per-program basis from "cable programming services," which are offered as a package, or "tier." This distinction would be meaningless if per-channel or per-program offerings are considered "tiers."

the context of cable programming services bolsters our interpretation; it states that "[p]er channel offerings available to subscribers upon purchase of the basic tier can enhance subscriber choice and encourage competition among programming services."[436]

166. We decline, however, to extend this requirement to purchase the basic tier to those who subscribe only to non-video services such as digital cable radio and Personal Communications Services. While broadcasters argue that Section 614(b)(7), which requires must-carry signals to be provided to every subscriber, should be interpreted to require every subscriber of a cable system to take the basic tier, we cannot find that Congress intended to impose such a requirement on subscribers to non-video cable services. As TCI argues, these services do not relate to the underlying purpose of establishing a basic service tier, and many of these services do not even connect to the television receiver.[437] The basic service tier was established and must-carry requirements were imposed "to restore a competitive balance to the video marketplace."[438] Congress was concerned that without signal carriage requirements, cable operators could threaten competition in the video marketplace by dropping or carrying in a disadvantageous position local broadcast signals.[439] It follows, then, that allowing subscribers to a cable system to receive video programming without purchasing the basic tier would also disadvantage local broadcast signals vis-a-vis cable programming. This is not the case, however, when cable subscribers purchase only non-video services. Finally, a major purpose of the Act is to promote consumer choice and flexibility.[440] In the absence of congressional direction to the contrary, we will not force consumers who seek only non-video services to purchase the basic tier.

(d) A Single Basic Tier

i. Background

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[436] House Report at 90 (emphasis added).

[437] TCI Comments at 27.

[438] House Report at 47.

[439] House Report at 51 (emphasis added).

[440] See Senate Report at 77 (noting that unbundling allows subscribers to choose only those programs they wish to pay for).

167. The Notice[441] indicated that the definition of what services are subject to rate regulation as part of the basic tier appears to contemplate only a single tier. This would effectively amend the general "basic tier" definition that remains in the Communications Act from the 1984 Cable Act, defining "basic cable service" as "any service tier which includes the retransmission of local television broadcast signals" (emphasis added).[442] The Notice stated that the 1992 Cable Act appears to contemplate a single "basic tier" of service that is subject to local rate regulation and that includes the services defined in Section 623(b)(7)(A)(i), (ii), and (iii). If this were not the case, the Notice reasoned, the anti-buy through provision of Section 623(b)(8) could be frustrated through the marketing of cumulative tiers of "basic" service. Further, the Notice indicated that the consistent references in the statute to "the" basic tier (in the singular number) suggest that Congress intended the existence of only one basic tier, and sought comment on this tentative conclusion.

ii. Comments

168. Cable operators agree with our tentative conclusion that the Act contemplates the existence of a single basic tier. Otherwise, they argue, the bifurcated regulatory jurisdiction and the anti-buy through prohibition mandated by the Act could be frustrated.[443] Franchise authorities and consumer interests, however, argue that operators may offer more than one tier of basic service. They contend that allowing more than one basic tier increases consumer choice and promotes cable operators' marketing flexibility; such an interpretation would not frustrate the Act's anti-buy through prohibition as long as the purchase of any one basic tier provides access to other offerings.[444]

iii. Discussion

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[441] Notice, 8 FCC Rcd at 514.

[442] Communications Act, § 602(3), 47 U.S.C. § 522(3).

[443] See, e.g., Cole Comments at 10-11; Nashoba Comments at 16; Newhouse Comments at 6; Cole Reply Comments at 9-10; Continental Reply Comments at 7.

[444] See, e.g., NATOA Comments at 68 n.36; Austin Comments at 22; CFA Comments at 121.

169. As we recently determined in the context of our buy-through proceeding,[445] the plain language of the 1992 Cable Act leads us to the conclusion that for purposes of rate regulation, the Act contemplates the existence of only one basic tier. The statute makes several references to a single basic service tier.[446] Moreover, the Act's bifurcated jurisdictional scheme would be greatly complicated by allowing a cable operator to market more than one basic tier. Congress clearly intended for qualified franchising authorities to regulate only the basic tier, which is defined as that tier containing broadcast stations (except superstations) and required PEG channels.[447] Congress vested jurisdiction over "cable programming services" in the Commission. "Cable programming service" is defined to include any video programming other than that carried on the basic service tier or offered on a per-channel or per-program basis.[448] Thus, tiers other than the basic service tier are subject only to Commission jurisdiction. If such tiers were sometimes subsumed in an expanded "basic" tier, and hence sometimes subject to only franchising authority regulation, this would complicate and confuse regulation and likely lead to inconsistent decisions. Moreover, such an approach would frustrate or at least complicate implementation of the buy-through prohibition, which is intended to minimize the conditions that can be placed on a customer's access to programming of his choice.[449]

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[445] See Report and Order in MM Docket No. 92-262, FCC 93-145, adopted March 3, 1993.

[446] See, e.g., Communications Act, § 623(b)(5)(D), 47 U.S.C. 543(b)(5)(D) (subscribers must "receive notice of the availability of the basic service tier"); Communications Act, § 623(b)(6), 47 U.S.C. 543(b)(6) (cable operator must provide 30 days' advance notice to franchising authority of price increase "for the basic service tier"); Communications Act, § 623(b)(7)(A), 47 U.S.C. 543(b)(7)(A) ("[e]ach cable operator ... shall provide its subscribers a separately available basic service tier"); and Communications Act, § 623(b)(7)(B), 47 U.S.C. 543(b)(7)(B) ("cable operator may add additional video programming signals or services to the basic service tier").

[447] Communications Act, § 623(b)(7), 47 U.S.C. § 543(b)(7).

[448] Communications Act, § 623(l)(2), 47 U.S.C. § 543(l)(2).

[449] We also do not believe that the Act permits the operator to apply a different definition of "basic service" to one class of customers than it applies to others.

170. In American Civil Liberties Union v. FCC,[450] the court of appeals held that under the 1984 Act, a tier of service that incorporates, in a marketing sense, the basic tier is itself also a basic tier service, although a tier added to a basic tier for a separate charge would not be considered a basic service.[451] The Notice sought comment on the effect of the 1992 Act on the ACLU definition of basic service. Commenters who argue that the Act permits more than one basic tier also argue that ACLU is still applicable; that is, the marketing of a tier determines whether it is basic or non-basic.[452] Commenters who contend that the Act permits only one basic tier also contend that ACLU does not apply.[453] We agree. The ACLU decision interpreted the definition of basic service in the 1984 Act. As just explained, we believe that Congress intended only one basic tier for purposes of the rate regulation provisions of the 1992 Act.[454] Accordingly, cable operators must place all of the required components of the basic service tier (e.g., broadcast signals and PEG channels) in one tier and unbundle that tier from all other service tiers. The operator may not place the required basic tier services in one tier and also include them in another expanded tier, since this would thwart Congress' intent that there be a single basic tier whose rates are regulated by local franchising authorities.

(2) Regulations Governing Rates of the Basic Service Tier

171. In this section we establish the federal regulatory requirements that will govern rates for the basic service tier. We address first statutory requirements for regulation of the basic service tier. We conclude that the statute does not require the Commission to place primary weight on any of the statutory factors governing rates for the basic

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[450] 823 F.2d 1554 (D.C. Cir. 1987).

[451] For example, if an operator sells a $10 basic tier and offers an additional set of channels for $5, these would be a basic ($10) and non-basic ($5) service. However, if the operator offers a $10 basic and a $15 tier that includes the basic service and the additional service, both the $10 service and the $15 service are basic services under the ACLU holding. ACLU, 823 F.2d at 1566 n.31.

[452] See, e.g., Austin Comments at 25.

[453] See, e.g., Cole Comments at 11-12; TCI Reply Comments at 26 n.54; Continental Comments at 11-13.

[454] However, the 1984 Act's definition may continue to apply for other purposes, e.g. to franchise agreements grandfathered under Section 623(j) of the Communications Act, 47 U.S.C. § 543(j).

service tier, but that we may do so as part of a reasoned balancing of statutory requirements and factors. We then examine the relative merits of a benchmarking versus a cost-of-service approach as the primary method for regulating rates for the basic service tier. We conclude that we should incorporate a benchmark approach into our framework for regulation of basic service tier rates with an opportunity for cable operators to justify rates above permitted levels based on costs. We then address whether local authorities should be afforded the option of selecting cost-of-service regulation as their primary mode of regulation of the basic service tier. We conclude that they should not because such an approach would establish a regulatory regime for the basic service tier different from what Congress intended. We also examine whether our regulations should be designed to produce lower rates for the basic service tier than for other tiers. We conclude that any advantages in producing a low priced basic tier are outweighed by the incentives that this could create for cable operators to reduce offerings on the basic service tier. Accordingly, we conclude that our regulations will be tier-neutral in terms of benchmark rate levels for the basic and cable programming service tiers.

172. We then adopt and address in more detail the requirements that will govern rates for the basic service tier. We first adopt the benchmark approach that will be part of our plan for regulating the basic service tier. In this regard, we discuss the various benchmark alternatives proposed in the Notice. We determine that the Cable Act of 1992 reflects a congressional conclusion that rates for cable service embody an ability to raise rates to unreasonable levels because of a lack of effective competition and that rates are potentially unreasonable to the extent they exceed competitive levels. We also explain that our industry survey confirms that rates of cable systems not subject to effective competition exceed competitive levels by approximately 10 percent on an average industry basis -- a difference we refer to as the "competitive differential." We determine, therefore, to adopt a benchmark approach based on the rates of systems subject to effective competition. Regulated systems with rates above competitive levels, as established by our benchmark formula, will be required to reduce their rates by up to 10 percent, which approximates the competitive rate differential. We additionally determine to examine in the Further Notice whether the Commission can, and should, exclude from the benchmark analysis the rates of systems in franchise areas in which fewer than 30 percent of households subscribe to the service of a cable system. Our preliminary analysis reveals that this would produce a competitive rate differential of approximately 28 percent. Use of this competitive rate differential could lead to further reductions in regulated cable rates.

173. We then explain how we will apply the benchmark system to determine a reasonable rate level for the basic service tier. Thereafter we will apply a price cap mechanism to that initial rate level to define future reasonable rates. We determine first that, for a given cable system, we will use the benchmark formula derived from our survey analysis to calculate the rate that would be charged by a similarly-situated competitive system. If the per channel rate being charged by the cable system is at, or below, this "benchmark" at the time the system becomes subject to regulation, its rate will be considered reasonable and will be the system rate to which the price cap governing future rate increases will be applied. Thus, systems with rates in effect at the time regulation begins that are below the benchmark will have their basic tier rates capped at current levels. For systems with rates at the time of regulation that are above the benchmark, we determine that the lawful rate for such systems will be determined by comparing their September 30, 1992 rates to the competitive benchmark rate derived from the benchmark formula. We conclude that the lawful rates for systems whose per channel rates exceeded the benchmark shall be the greater of the September 30, 1992 per channel rate reduced by the industry-wide competitive rate differential of approximately 10 percent, or the applicable benchmark, adjusted for inflation occurring between September 30, 1992 and the initial date of regulation.[455] For systems with below benchmark rates in effect on September 30, 1992, the lawful per channel rate shall be the benchmark rate adjusted for inflation. Local franchising authorities may require cable operators to reduce rates for the basic service tier to these levels. Cable operators that do not wish to reduce their rates to these permitted levels must justify their rates with a cost-of-service showing.[456]

174. We then establish and explain the price cap that will govern rate increases after initial rates are set under our benchmark approach as described above. We justify the use of a price cap to govern rates for the basic service tier, its application to rates below the benchmark, and explain the annual adjustment index. We then address external costs, i.e., costs that are not subject to the price cap and that cable operators may directly pass on to subscribers. We determine that

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[455] As we explain below, the permitted per channel rate as of the initial date of regulation is also adjusted under our requirements to accommodate franchise fees, equipment revenues, and changes in the number of channels offered by the system that have occurred since September 30, 1992.

[456] A system electing cost-of-service proceedings should be aware that its rates are subject to rollbacks below the benchmark level if the system's costs are shown to justify such lower rates.

retransmission consent fees incurred after October 6, 1994, other programming costs, franchise fees, costs of franchise requirements, including the costs of satisfying local franchise requirements for public, educational, and governmental access channels, and local and state taxes on the provision of cable television service will be accorded external treatment. We determine that for all external costs, except for franchise fees, external treatment shall be accorded only to costs that are incremental to those costs incurred prior to regulation or 180 days from the effective date of our regulations, whichever occurs first. The entire amount of franchise fees may be accorded external treatment up until the date of regulation because our benchmark calculations exclude franchise fees. In addition, we determine the permitted per channel rate should be adjusted to accommodate increases in external costs only to the extent those costs exceed inflation.

175. Finally, we address in this section issues arising when a cable operator seeks to make cost-of-service showings to justify basic tier rates above their existing or capped levels. We conclude that the record now before us is not sufficient to permit us to establish at this time cost-of-service standards for cable service by which these cost showings will be judged, and in particular the profit level that would justify a cable operator's existing rates for the basic service tier if above the cap. Instead, we determine that we will adopt and issue in the near future a separate Second Further Notice of Proposed Rulemaking to establish such standards. Pending resolution of the rulemaking we will leave local franchising authorities with the discretion to determine the cost-of-service standards they will apply to cost showings by cable operators.[457]

(a) Statutory Standards

i. Background.

176. The Cable Act of 1992 requires the Commission to ensure, by regulation, that rates for the basic service tier are reasonable.[458] It directs the Commission to adopt regulations designed to protect subscribers of any cable system not subject to effective competition from paying rates higher than those that would be charged if the system were subject to effective

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[457] In Section D of this Report and Order we adopt cost accounting and cost allocation requirements that will govern the manner in which cable operators must present costs for purposes of cost-of-service showings pending adoption of final cost-of-service standards.

[458] Communications Act, § 623(b)(1), 47 U.S.C. § 543(b)(1).

competition.[459] In complying with this directive, the Commission must also seek to reduce the administrative burdens on subscribers, cable operators, franchising authorities, and itself, and it may adopt formulas or other mechanisms and procedures to achieve this objective.[460] Rate regulations must additionally take into account seven factors:

(1) the rates for cable systems that are subject to effective competition;

(2) the direct costs (and changes in such costs) of obtaining, transmitting, and providing signals carried on the basic tier including additional video programming signals or services beyond the "must carry" local broadcast television signals, and any public, educational, and governmental access programming required by the franchising authority;

(3) only a reasonable and properly allocable portion, as determined by the Commission, of the joint and common costs of obtaining, transmitting, and providing signals on the basic service tier;

(4) cable operator revenues from advertising on the basic tier or other consideration obtained in connection with the basic tier;

(5) the reasonably and properly allocable portion of taxes and fees imposed by any state or local authority on transactions between cable operators and subscribers or assessments of general applicability imposed by a governmental entity applied against cable operators or cable subscribers;

(6) the cost of satisfying franchise requirements to support public, educational, or governmental channels or the use of such channels or any other services required under the franchise; and

(7) a reasonable profit, as defined by the Commission consistent with the Commission's obligations to ensure that rates are reasonable and the goal of protecting subscribers of any cable system not subject to effective competition from paying more for basic tier

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[459] Id.

[460] Communications Act, § 623(b)(2)(A) and (B), 47 U.S.C. § 543(b)(2)(A) and (B).

service than subscribers would pay if the system were subject to effective competition.[461]

177. In the Notice we tentatively concluded that Congress intended that our regulations embody a standard of reasonableness for basic tier rates that reflects a reasoned balancing of these statutory goals and factors. We further tentatively concluded that Congress did not mandate that we give greater or primary weight to any one statutory goal as we formulate regulations to govern rates for the basic service tier, but did intend to leave the Commission discretion to determine in the rulemaking process the comparative weight to be assigned to each of the seven factors.

ii. Comments.

178. Commenters generally agree that implementing regulations must reflect a reasoned balancing of the statutory goals and factors.[462] Many commenters, however, envision implementation of rate regulation of the basic service tier that would place greater weight on some factors than others.[463] Several commenters contend that the statutory goal of protecting consumers from paying more for basic service than if the system were subject to effective competition is the overriding goal that Congress intended to achieve and that the balancing of the other statutory factors must not conflict with this goal.[464]

iii. Discussion.

179. The Cable Act of 1992 requires the Commission to establish regulations that will assure reasonable rates for the basic service tier, but does not explicitly define "reasonable." Instead, it requires that regulations be designed to achieve statutory goals and to take into account the enumerated statutory factors. While some commenters have presented regulatory alternatives that would place more or less weight on some statutory factors in making this determination, nothing in the plain language of the Act mandates that all factors must be weighted equally as we implement our rate setting requirements,

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[461] Communications Act, § 623(b)(2)(C), 47 U.S.C. § 543(b)(2)(C).

[462] See, e.g., Armstrong Comments at 18; CIC Comments at 1-11; Cole Comments at 20; Continental Comments at 21-22; NATOA Comments at 39.

[463] See generally paragraphs 176-177, supra.

[464] NATOA Comments at 40; NYConsumers Comments at 7-8; Rapids Comments at 23.

or that any one factor or set of factors be given primary weight. Nor does the legislative history suggest a contrary conclusion. Accordingly, we conclude, as we tentatively did in the Notice, that our regulations will comply with the statute if they reflect a reasoned balancing of all the statutory goals and factors. In particular, our regulations will satisfy the standard established in the statute (1) if they establish a measure of reasonableness that takes each factor, including the rates of systems subject to effective competition, into account and (2) if, overall, they are designed to "protect" subscribers from paying rates for their cable service that are higher than if the system were subject to effective competition. In the following paragraphs of this subsection, we explain how our regulations meet this two-pronged test.

180. As discussed in para. 14, supra, the findings in the statute that cable operators not subject to effective competition are able to exercise undue market power, the overall structure of the statute, and the statutory goals clearly permit the Commission to exercise its discretion by placing relatively greater weight on the rates of systems subject to effective competition in fashioning a standard of the reasonableness for rates for the basic service tier, if there is a reasoned basis for doing so. Given the results of our industry survey, which reveal a significant differential between basic tier rates of competitive and noncompetitive systems -- and higher tiers as well -- we determine that under the statute, we can, and should, in the public interest, place primary weight on the rates of systems subject to effective competition. Accordingly, our regulations governing rates for the basic service tier are aimed toward achieving rate levels for that tier that are closer to rates of systems subject to effective competition. We explain in later sections of this Report and Order how we take into account other statutory factors for the basic service tier.

(b) Benchmarking versus Cost-of-Service Regulation

i. Background.

181. In the Notice, we identified benchmarking and cost-of-service regulation as the two generic approaches the Commission could use to meet the Act's requirement that rates for the basic service tier be reasonable.[465] We included as one benchmark alternative a price cap approach to regulation of cable service rates.[466] We tentatively concluded that a benchmarking approach to rate regulation would best comply with the directives of the Act by enabling the Commission to achieve reasonable rates

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[465] See Notice, 8 FCC Rcd at 518-19.

[466] Notice, 8 FCC Rcd at 522, paras. 49-52.

at lower cost and with less administrative burden than traditional cost-of-service regulation could.[467] Although we proposed to adopt a benchmarking alternative in the Notice, we also concluded that cost-of-service regulatory principles could play a secondary role for cable operators seeking to justify the reasonableness of rates that do not meet our primary benchmarking standard.[468] We solicited comment on both our analysis of the various alternatives we set forth for rate regulation, and on the tentative conclusions presented in the Notice.

ii. Comments.

182. The majority of parties addressing the proper regulatory approach for cable rate regulation endorse the use of a benchmarking alternative over traditional cost-based regulation. Commenters assert that the Cable Act's legislative history reveals that Congress has rejected common carrier type cost-based rate of return regulation.[469] Many parties additionally contend that even if cost-of-service rate regulation were implemented, the statutory objective of reasonable rates for basic tier services could not be fulfilled because of inherent drawbacks with the cost-based regulatory approach.[470]

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[467] Id. at 519, para.33.

[468] Id.

[469] See, e.g., AdelphiaII Comments at 45-49; BellSouth Comments at 3; NATOA Comments at 41; NCTA Comments at 14; Newhouse Comments at 10; Rapids Comments at 23-25; Time Warner Comments at 17-20.

[470] See, e.g., AdelphiaII Comments at 45-59; Armstrong Comments at 16-17; Carib Comments at 5; CATA Comments at 14; CIC Comments at 11-12; Cole Comments at 24-26; Comcast Comments at 22-29; Continental Comments at 26; Cox Comments at 8-11; Intermedia Reply Comments at 1-2; NCTA Comments at 11-13; NECTA Reply Comments at 3; Oxnard Comments at 4; Rapids Comments at 23-25; SmallSystems Comments at 6; TCI Reply Comments at 10-12; Time Warner Comments at 15-19. The following municipalities favor a benchmarking regulatory approach and argue that it is consistent with Congress' goal for the FCC to enact a rate regulation formula that is "uncomplicated to implement, administer and enforce." See Bayonne Reply Comments at 8; Chandler Comments at 3; Cincinnati Comments at 4; Dade Reply Comments at 7; Fort Lauderdale Comments at 3; Garden City Comments at 3; Hastings Comments at 3; Hays Comments at 4; Indian River Comments at 4; Junction City Comments at 3; Lake Forest Comments at 3; Liberal Comments at 4; Lincoln Park Comments at 3-4; Louisville Comments at 3; MACC Comments at 3; Madison Comments at 3; Mankato Comments at 3; Marshall Comments at 3; Mentor Comments at 3; Mesa Comments at 4; Mount Prospect Comments

183. Commenters identified several disadvantages unique to cost-of-service rate regulation that they claim would outweigh any potential benefits derived from such an approach. Commenters state that cost-of-service regulation: a) is administratively costly to all parties involved[471]; b) provides no incentives for efficiency[472]; c) discourages risk taking and innovation[473]; d) encourages padding rate base to earn larger overall return[474]; and e) increases incentives to cross-subsidize non-regulated costs with regulated costs.[475] CIC and Time Warner aver that traditional telephone company cost-of-service regulation is unsuitable for cable operators and should not be adapted to cable because the industries are significantly different.[476] NCTA states that a cost-based regulatory approach would create delays and uncertainties that would hinder the availability of financing for cable operators and disrupt payment of their existing loan obligations.[477] In addition, NCTA questions whether local franchising authorities have the financial ability, expertise, and competence to apply cost-of-service regulation.[478] Finally, several parties argue that although benchmarking should be the primary method of establishing reasonable basic tier rates, cost-of-service regulation should remain available as a secondary

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at 4; Multnomah Comments at 7-8; Niles Comments at 3; Oakland Comments at 3; Ottawa Comments at 2; Palm Desert Comments at 3; Phillipsburg Comments at 3; Prince George Comments at 4; Ramsey Comments at 3; Salina Comments at 3; San Antonio Reply Comments at 4.

[471] See, e.g., AdelphiaII Comments at 45-49; Cole Comments at 24-28; Comcast Comments at 22-29; Continental Comments at 26; Intermedia Reply Comments at 1-2; Mesa Comments at 4; NCTA Comments at 13.

[472] See, e.g., Cole Comments at 24-28; Continental Comments at 26; NCTA Comments at 13; Time Warner Comments at 15-19.

[473] See, e.g., AdelphiaII Comments at 22-24; Comcast Comments at 22-29.

[474] See, e.g., AdelphiaII Comments at 45-49; NCTA Comments at 13; Time Warner Comments at 15-19.

[475] See AdelphiaII Comments at 45-49.

[476] See CIC Reply Comments at 17; Time Warner Comments at 14.

[477] See NCTA Comments at 13.

[478] See NCTA Comments at 14.

procedure as a safety net for the justification of rates above the benchmark.[479]

184. On the other hand, many municipalities argue that the Cable Act directs the Commission to impose a scheme of basic cable service rate regulation "patently analogous" to telephone common carrier rate regulation.[480] CFA contends that the lack of effective competition in the cable industry necessitates that the Commission implement cost-of-service regulation.[481] Parties favoring such an approach argue that a standardized benchmarking system, unlike cost-of-service regulation, would result in higher basic rates since it fails to take into account the vast differences in cable operating systems.[482] Montana states that based on its experience the benefits of lower rates and improved customer services associated with cost-of-service regulation would outweigh the cost of such regulation.[483]

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[479] See AdelphiaII Comments at 50-51; Carib Comments at 5; Cole Comments at 24-25; Continental Comments at 35-36; Fairfax Reply Comments at 7; NCTA Comments at 14; Newhouse Comments at 10; Northland Comments at 6; NJ Comments at 7; NYNEX Comments at 4; Prime Comments at 4; SSO Reply Comments at 7-8; USTA Comments at 10-13. Hawaii asserts that the state should have the option of resorting to cost-of-service ratemaking on an individual system basis where either the national or local benchmark produces an unreasonable rate. Hawaii Reply Comments at 1-6.

[480] See, e.g., Baltimore Comments at 8-9; Bowling Green Comments at 9, 14; Carson Comments at 9, 14; Conneaut Comments at 9, 14; Drexel Comments at 9, 14; Key West Comments at 9, 14; McKinney Comments at 9, 14; NewBern Comments at 9, 14; Paducah Comments at 9, 14; Parsippany Comments at 9, 14; Port St. Lucie Comments at 9, 14; St. Petersburg Comments at 11, 15; Salisbury Comments at 9, 14; Williamston Comments at 9, 14. NYNEX and Pactel favor cost-based basic tier rates for cable subscribers and propose that price caps be implemented for subsequent price adjustments. See NYNEX Comments at 4; Pactel Comments at 2.

[481] See CFA Comments at 85-87.

[482] See, e.g., Dennison at 2; Minn. Comments at 10-12; Montana Comments at 2; Randolph Comments at 1-2; Rocky Comments at 3. Although Fall River does not specifically endorse either regulatory approach, it contends that a national benchmark would increase current rates because it would fail to recognize unique differences among cable systems. See Fall River Comments at 2. Media General asserts that it could support a cost-based approach unless the Commission adopts a benchmark that can distinguish between various cable operators. See Media General Comments at 3-4.

[483] Montana Comments at 2.

iii. Discussion.

185. As we stated in the Notice, under a benchmark approach to rate regulation the Commission would establish a rate, or a simple formula to derive a rate, that would be used to measure the reasonableness of a cable system's per channel prices. Benchmarks permit a ready means of identifying systems with presumptively unreasonable rates, while at the same time defining a zone of reasonableness that can accommodate a range of existing rate levels below the benchmark. As we stated in the Notice, a benchmark could be based on selected industry characteristics. We stated that a benchmark could protect consumers from excessive rates, and, by eliminating the need for detailed cost-based regulation, would keep the costs of administration and compliance low. Thus, a benchmark approach to regulation of basic tier rates holds substantial advantages.

186. Under cost-of-service regulation, by contrast, a cable system's rates would be reviewed using the established standards of cost-of-service regulation traditionally applied to public utilities. As we observed in the Notice, while there are some advantages to cost-of-service regulation, there are significant disadvantages. Cable operators would have little incentive to be efficient, to improve service, or otherwise to make regulated service more attractive to consumers. Cost-of-service regulation also imposes heavy burdens upon regulators and regulatees because of the significant administrative and compliance costs associated with this regulatory model.

187. Based on these considerations, we conclude that we should use a benchmark approach for regulating rates for the basic service tier. The benchmark formula we have developed is based on our analysis of the rates of systems subject to effective competition. Use of this benchmark formula will provide a simple way to ascertain on an individual system basis the extent to which rates exceed the competitive rate level. As such, it achieves our goal of identifying a relatively simple way of determining the reasonableness of cable rates. By comparing the rate derived by applying the benchmark formula to a cable system's current or September 30, 1992 rates, as we explain more extensively below, we determine an initial reasonable regulated rate for each cable system. Thereafter, a price cap mechanism applied to those rates will govern future rate changes. Our rules will, however, additionally permit cable operators to use cost-of-service principles to justify rates that exceed the permitted rates calculated under our benchmark and price cap approach.

188. We believe that among the regulatory alternatives that we could realistically adopt at this time, this model for regulating basic service tier rates will best meet the statutory mandate that we reduce administrative burdens on subscribers,

cable operators, franchising authorities, and the Commission. At the same time, we anticipate that the price cap requirements we adopt, coupled with the opportunity we include for cost showings to justify otherwise presumptively unreasonable rates, will establish a regulatory framework that will assure that basic service tier rates are reasonable and will also effectively balance the statutory goals and factors we are directed to use for making that determination.

(c) Local Authority Discretion

i. Background.

189. As indicated, in the Notice we proposed to adopt a benchmark as the primary mechanism to regulate the rates for the basic service tier with cost-of-service procedures invoked only if cable operators seek to justify a rate higher than the price defined by the applicable benchmark. The Notice did not specifically address whether local authorities should have discretion to choose cost-of-service regulation.

ii. Comments.

190. While not necessarily addressing local authority discretion to elect cost-of-service regulation, most cable operators oppose cost-of-service regulation.[484] Others directly oppose allowing local authorities to elect cost-of-service regulation.[485] NATOA and other commenters, however, contend that franchising authorities should be permitted to elect cost-of-service regulation.[486] They assert that there should be symmetry in the Commission's overall regulatory scheme, i.e., if cable operators are able to elect cost-of-service regulation to justify rates above the benchmark, local authorities should be permitted

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[484] See, e.g., AdelphiaII Comments at 45-49; Armstrong Comments at 16-17; Carib Comments at 5; CIC Comments at 11-12; Cole Comments at 24-25: Comcast Comments at 22-29; Continental Comments at 26; Cox Comments at 8-11; NCTA Comments at 11-14; Newhouse Comments at 10; Prime Comments at 4; TCI Comments at 15-22; Time Warner Comments at 17-20.

[485] See, e.g., Comcast Comments 22-29; NCTA Comments at 13.

[486] See, e.g., Austin Comments at 48-49; Montana Comments at 2; NewBern Comments at 9; NATOA Comments at 45, n.20; NewBern Comments at 9, 18-22; NYConsumers Comments at 8; Rapids Comments at 30-31.

to elect it if they believe that rates below the benchmark are excessive in relation to costs.[487]

iii. Discussion.

191. As indicated, we believe that the best method of regulating basic service tier rates is to set rates initially using benchmarks and then to apply a price cap approach on a going-forward basis. This approach will be the primary mechanism for regulating basic service tier rates, with cost-of-service procedures playing a secondary role. We believe that permitting franchising authorities to elect cost-of-service regulation as their primary mode of regulation would strike a different balance of statutory objectives, one that could substantially increase administrative burdens on cable operators at the local level and on the Commission as it reviews local cost-of-service decisions. We believe that the imposition of such burdens would be less consistent with statutory objectives than the approach we have selected. Accordingly, we conclude that we will not permit local authorities to elect cost-of-service regulation for the basic service tier. Rather, local governments must apply the benchmark system of rate regulation we adopt herein.

(d) Basic Rate Level in Comparison to Other Tiers

i. Background.

192. In the Notice, we noted that the creation of a low priced basic service tier could increase the number of potential subscribers able to afford basic tier service.[488] The Notice also acknowledged, however, that a mandated low-priced service tier could give cable operators an incentive to include only the statutorily required channels on their basic tiers.[489] We asked for comment on the extent to which Congress intended a low priced tier, and the extent to which our rate regulations should not effectively restrict a cable operator's discretion to provide programming on the basic tier beyond the minimum statutory components. We tentatively concluded that any rate regulation approach we adopt should effectuate fully the goals of the Cable Act without unintentionally limiting either a cable operator's discretion to tier programming services directly, or the continued growth of cable programming services indirectly.

ii. Comments.

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[487] See, e.g., Dover Comments at 15-16; Municipal Comments at 15.

[488] Notice, 8 FCC Rcd at 518-519.

[489] Id.

193. The cable industry and others argue that Congress favors the establishment of a low-cost basic service tier consisting mainly of broadcast stations.[490] Comcast asserts that Congress supports a low-priced minimum service tier because it found that broadcast stations are the most popular programming offered by cable operators.[491] New Bedford, however, contends that a low-cost basic tier is necessary to facilitate affordable access to cable services for the elderly and lower income subscribers.[492] Austin, Palm Desert, and Schaumburg agree that the Cable Act intended to produce low rates for basic service, but claim that cable operators should offer more than just a stripped-down version of basic tier service.[493]

194. CFA opposes a broadcast-basic-only tier and states that it is contrary to Congress' rejection of specific proposals to limit which programming operators could include in the basic tier.[494] CFA and others also contend that the term "low-priced" was used by Congress in order to prevent cable operators from loading excessive costs on basic tier subscribers.[495] USA avers that Congress opted for reasonable, rather than low-priced, basic tier rates so that subscribers could continue to receive high quality programming.[496] NYNEX asserts that an artificially low basic tier rate would give cable operators a competitive edge and discourage competition.[497] Finally, TIA maintains that a low-priced basic tier would stifle the cable industry's ability to invest in new technologies.[498]

iii. Discussion.

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[490] See, e.g., Comcast Comments at 14-15; NewBedford Comments at 4; Newhouse Comments at 5; Northland at 10-11.

[491] Comcast Comments at 14-15.

[492] NewBedford Comments at 4; Somerville Comments at 4.

[493] Austin Reply Comments at 10-11; Palm Desert Comments at 10; Schaumburg Comments at 7.

[494] CFA Reply Comments at 15-15.

[495] CFA Reply Comments at 15-16; McKinney Comments at 7; NewBern Comments at 7.

[496] USA Comments at 11.

[497] NYNEX Comments at 2.

[498] TIA Comments at 19.

195. As we stated in the Notice, a low-priced basic tier could increase the number of subscribers who would be able to afford it. It would be possible for the Commission to establish rate regulation requirements that would encourage or mandate a low-priced basic service tier. We could, for example, provide for greater rate reductions for the basic service tier than for cable programming services. This, combined with other possible features of the framework for rate regulation of cable service, could effectively prevent cable operators from charging generally the same level of rates for the basic tier as for higher tiers.[499]

196. The potential benefits of a low cost basic tier in comparison to other tiers, however, must be balanced against the likelihood that suppressing price levels for the basic tier would give cable operators incentives to move services to the other tiers where they could receive relatively higher prices. We are not persuaded that this is preferable to a framework that permits a somewhat higher price for the basic tier, but one with more programming potentially available on it.

197. In addition, regulations that would encourage or mandate a relatively lower price for the basic service tier than for higher tiers would complicate rate regulation of cable programming services. Mandated separate rate levels for basic and higher tiers would require, for example, more extensive analyses of industry data and a careful examination of the impact of different rate levels on the cable industry, program suppliers, and consumers. Widely disparate rate levels would additionally increase the burdens on cable operators and rate regulators and the complexity of their decision making. We are unpersuaded that the possible benefits of a mandated low-priced basic service tier outweigh the added regulatory complexity it would bring. We prefer to take a more cautious approach at the initial stages of rate regulation for the cable industry and to avoid creating incentives that could reduce the number of services on the basic tier. Accordingly, we will not adopt a regulatory framework for cable service in this Report and Order that seeks lower rates for the basic service tier in comparison to higher tiers.[500] Instead, we establish a framework for rate

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[499] Separate strict cost-of-service standards for the basic service tier could additionally restrict the ability of cable operators to charge rates for the basic tier that are comparable to rates for higher tiers.

[500] This does not mean, of course, that we are unconcerned about the price for basic service. Our regulations are designed to assure that rates for the basic service tier are reasonable. We conclude here only that we will not seek a low priced basic tier that requires shifting of a significant share of a system's costs

regulation that is tier neutral.[501] Thus, as we explain in succeeding portions of this Report and Order, we are establishing the same framework for calculating reasonable rates for both the basic service tier and cable programming services.[502]

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to other tiers or encourages operators to reduce the level of programming carried on the basic tier.

[501] Our regulations provide that the permitted charge per channel will be calculated as an average across all tiers. The manner of determining the permitted per channel charge is explained and governed by FCC Form 393 that we are adopting in this Report and Order. See Appendix D. The permitted charge per channel, prior to adjustments for inflation and external costs, will be the same for all tiers. In addition, the benchmark formula is based on prices that are averaged across all tiers. Per channel charges calculated in this way and compared to a benchmark that is based on tier-averaged rates, will effectuate our determination that rules defining lawful rates should be tier neutral. Such per channel charges are also administratively simpler for cable operators and regulators to use than would be separate requirements for each tier. Thus, these provisions will help achieve the statutory requirement of reducing burdens on cable operators and regulators, although permitted charges for tiers can vary due to different external costs. This will not create incentives to shift programming between tiers because operators can recover incremental increases in external costs on either tier fully. See n. 607, supra.

[502] In the Notice, we proposed a cost-based regulatory alternative that would permit us to prescribe guidelines for basic service rate regulation by the local franchising authority that used an individual system's costs to define reasonable rates. Notice, 8 FCC Rcd at 523, paras. 53-56. We requested comment on the proposal that franchising authorities be required to find reasonable basic service rates that allow recovery of at least the direct costs of the channels in the basic tier, and that would also include a nominal contribution to the joint and common costs of the system as a whole. Cable operators uniformly oppose using this alternative. See, e.g., CIC Comments at 12-13, Cole Comments at 29; Continental Comments 34-35; Media General Comments at 8; Time Warner Comments at 34. Media General contends that such an approach would contradict the Cable Act's requirement that rates only include such portion of joint and common costs as is properly allocable to the basic service tier. Media General Comments at 8. CIC, Cole, and Continental also assert that this approach contains the same administrative disadvantages as traditional cost-of-service regulation. Municipalities, however, favor this cost-based alternative. See, e.g., Austin Comments at 47-48; Dover Comments at 15; Minn. Comments at 13; Municipal Comments at 15; Rapids at 29. Austin and Rapids claim that this alternative would satisfy

(e) Adoption of a Benchmark System to Govern Rates for the Basic Service Tier

198. In this section, we describe the benchmark system that will be incorporated into our framework for regulation of basic tier rates. At the heart of our scheme is our benchmark formula which is based on our analysis of the average rates of systems subject to effective competition. We additionally explain how the benchmark formula will be used to calculate a competitive benchmark rate for each cable system with which the system's current and/or September 30, 1992 rates can be compared to determine the initial regulated rate level for the basic service tier.

AA. The Competitive Benchmark

i. Background.

199. In the Notice we sought comment on several benchmark alternatives: rates charged by systems facing effective competition; past regulated rates; 1992 average per-channel rates of cable systems; or the average or typical costs of providing cable service.[503] Concurrently, we selected a random sample of approximately 300 cable systems from which we sought information concerning current prices, past prices, and system characteristics to aid in designing an appropriate benchmark.[504] We also obtained information from 141 systems appearing to be subject to effective competition, as defined by the statute, which submitted the same information so that the benchmark could also take into account the rates of systems subject to effective competition.[505]

ii. Comments.

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the Cable Act's intent that basic service rates parallel rates charged by competitive systems. Dover and Municipal believe that the data necessary for this regulatory method is either readily available already or easily obtainable if required. We reject this approach since rate regulation based on the direct costs of signals plus a nominal contribution to joint and common costs would permit costs to be shifted from the basic tier to higher tiers.

[503] See Notice, 8 FCC Rcd at 521-22.

[504] Order, 8 FCC Rcd 226 (1992). For information concerning the survey instrument and the survey results, see Appendix E.

[505] Id. A notice of availability of an electronic compilation of the survey results was placed in the public record on February 24, 1993.

200. Rates of Systems Subject to Effective Competition. Among the various alternative benchmarks, cable operators, municipalities, telephone companies, and other commenters express the strongest support for the alternative based on rates charged by systems facing effective competition.[506] Parties endorsing this alternative aver that it would not be unduly burdensome to administer, and would also best achieve Congress' paramount directive to ensure that subscribers only pay rates reflective of effective competition.[507] On the other hand, some cable operators, municipalities, and other commenters opposing this approach question whether the existing small number of cable systems subject to effective competition can produce a statistically valid benchmark.[508] Several parties also maintain that rates charged by systems subject to effective competition would be skewed since short-term price wars in overbuild situations have created artificially low rates.[509] Finally, Dover and Municipal contend that this benchmark approach

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[506] See, e.g., AGs Comments at 6-8; Atlanta Reply Comments at 2; Austin et. al. Comments at 41-43; Ayden Reply Comments at 2; Bayonne Reply Comments at 8-9; Bell Atlantic Comments at 6-8; Clinton Reply Comments at 2; Comcast Comments at 29; Continental Comments at 29-30; Fairborn Reply Comments at 2; Georgetown Reply Comments at 2; Greensboro Reply Comments at 2; Greenville Reply Comments at 2; Henderson Reply Comments at 2; Iowa City Reply Comments at 2; Kinston Reply Comments at 2; Laurens Reply Comments at 2; Laurinberg Reply Comments at 2; Municipal Reply Comments at 24; NATOA Comments at 41-42; NCTA Comments at 17-19; NMCC Comments at 2-3; Owensboro Reply Comments at 2; Piscataway Reply Comments at 2; Reidsville Reply Comments at 2; San Diego Comments at 4; Schaumburg Comments at 8; Thousand Oaks Comments at 14-15; Time Warner Comments at 24; Titusville Reply Comments at 2; Worthington Reply Comments at 2. We also note that many parties advocating a benchmark methodology contend that benchmarks should be calculated on a per-channel basis. See, e.g., AdelphiaII Comments at 53-56; Bell Atlantic Comments at 6-8; CIC Comments at 16-18; Discovery Comments at 6-10; Encore Comments at 12-13; Newhouse Comments at 11; Tallahassee Comments at 2; TCI Reply Comments at 10; Time Warner Comments at 21-25; Viacom Reply Comment at 9-11.

[507] See, e.g., AGs Comments at 6-8; Austin Comments at 41-43; NATOA Comments at 41-42.

[508] See, e.g., AdelphiaII Comments at 56-57; Dover Comments at 10-11; Falcon Comments at 28; Municipal Comments at 11; NAB Reply Comments at 13; NJ Comments at 18; Rapids Comments at 25. Although NCTA favors this approach with modifications, it too raises this issue. NCTA Comments at 17-19.

[509] CIC Comments at 27; NCTA Comments at 18; Northland Comments at 25-27; SDA Comments at 10; Time Warner Comments at 24.

also fails to address whether cable systems subject to effective competition are truly competitive with one another and, if they are, whether their costs are representative of other cable systems.[510]

201. Past Regulated Rates. Cable operators along with several municipalities and telephone companies oppose implementing benchmark regulation based upon the historical rates charged by cable operators in previous years.[511] NCTA and others argue that the Commission should not rely on past regulated rates, from either 1984 or 1986, since those rates were suppressed below competitive levels by franchising authorities.[512] Cable operators also maintain that no past regulated rate adjustment mechanism would fairly take into account the effect of cable systems that were acquired, upgraded, rebuilt or integrated with adjacent systems since 1986.[513] NCTA and Intermedia contend that a major flaw in establishing a benchmark based on past regulated rates adjusted for inflation, is that it would not reflect the spiraling increases in cable operators' labor and benefit costs, costs that have outpaced inflation since 1984.[514] Finally, Adelphia avers that a past regulated rate benchmark would ignore the fact that, in 1986,

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[510] Dover Comments at 10-11; Municipal Comments at 11.

[511] AdelphiaII Comments at 57-60; Bell Atlantic Comments at 7; Cole Comments at 28; Continental Comments at 30-31; Falcon Comments at 28-30; Intermedia Reply Comments at 3-6; NCTA Comments at 21-23; NJ Comments at 19; Rapids Comments at 26; TIA Comments at 21-22.

[512] See, e.g., AdelphiaII Comments at 57-60; Cole Comments at 28; Continental Comments at 30-31; Intermedia Reply Comments at 3-6; NCTA Comments at 20. Parties contend that enactment of the Cable Act of 1984 supports this contention since it was premised on the need to liberate cable systems from artificial rate restraints. Adelphia avers that rates in effect in 1986 were artificially low because they reflected the urban market "bidding wars" for cable franchises. In addition, Continental claims that many cable systems in 1986 were operating under local government imposed multi-year rate freezes.

[513] See, e.g., Cole Comments at 28; Continental Comments at 30-31. Bell Atlantic and Rapids add that an adjusted past regulated rate would also not account for changes in operating efficiency achieved by cable operators since either 1984 or 1986. Bell Atlantic Comments at 7; Rapids Comments at 26.

[514] Intermedia Reply Comments at 3-6; NCTA Comments at 22.

cable operators often included a number of cable networks and superstations in the composition of their basic offerings.[515]

202. Consumer advocates, state governmental organizations, and others favor implementing a benchmark based on past regulated rates.[516] CFA and BellSouth argue that cable rates from 1984 or 1986 should be assumed to be reasonable since they represent charges that were deemed acceptable when rates were subject to regulation or oversight by local franchise authorities.[517] Connecticut contends that a benchmark based on 1986 rates, but adjusted for inflation, would: eliminate the excessive rate increase since 1986, protect cable systems that could cost justify rate increases above the CPI, and reward operators who have efficiently kept their costs below the CPI's level.[518] BellSouth and Connecticut also state that this approach would have the advantage of ensuring that benchmark rates throughout the nation will be reasonable for all individual systems.[519]

203. Average Rates. Municipalities, state governmental organizations, telephone companies and others oppose using a benchmark based on an average of the rates currently charged by all cable operators.[520] Most of the commenters opposing such a benchmark contend that it would incorporate monopoly profits included in existing cable rates, and would result in violating the Cable Act's intent to protect consumers from noncompetitive unreasonable cable rates.[521] BellSouth maintains that this

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[515] AdelphiaII Comments at 58.

[516] See, e.g., BellSouth Comments at 2-7; CFA Comments at 87-89; Conn. Comments at 9; MCATC Comments at 8; NMCC Comments at 3.

[517] Bell South Comments at 2-5; CFA Comments at 87-89.

[518] Conn Comments at 9.

[519] BellSouth Comments at 5; Conn. Comments at 9.

[520] See, e.g., Austin Comments at 43-46; Bell Atlantic Comments at 7; BellSouth Comments at 5-6; Comcast Comments at 29; Dover Comments at 14; Fairfax Reply Comments at 16-17; Lakeville Reply Comments at 2; Lower Merion Reply Comments at 3-4; Minn. Comments at 11; MCATC Comments at 8; Municipal Comments at 14; NCTA Comments at 24; NJ Comments at 19; NMCC Comments at 2; Rapids Comments at 26; TIA Comments at 22.

[521] Austin Comments at 43-46; Bell Atlantic Comments at 7; Comcast Comments at 29; Dover Comments at 14; Minn Comments at 11; Municipal Comments at 14; NJ Comments at 19; Rapids Comments at 26.

benchmark proposal would also force cable systems to resort to cost-of-service regulation since there is a likelihood that many systems would have operational costs above the average embedded costs assumed in any average rate calculation.[522] On the other hand, Continental, NCTA, and Time Warner assert that a benchmark founded on current average rates would be readily available and could be used as either a stop-gap measure, or, in conjunction with the proposed benchmark based on rates of competitive cable systems.[523]

204. Average or Typical System Costs. Cable operators uniformly oppose any benchmark based on average costs and application of cost-of-service principles.[524] They claim that a cost-of-service benchmark would: be at odds with the intent of the Cable Act, be administratively difficult to implement; and would have all the undesirable characteristics of traditional cost-based regulation.[525] Municipalities and broadcasters, however, favor a cost-of-service benchmark and maintain that it would best achieve Congress' intent to produce reasonable cable rates by limiting the cable operator to cost plus a reasonable rate of return.[526] Austin, CFA and NAB all present specific modified cost-based benchmark proposals that they assert would result in achieving reasonable rates without the negative incentives normally associated with traditional rate of return regulation.[527]

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[522] BellSouth Comments at 6.

[523] Continental Comments at 30-33; NCTA Comments at 24-26; Time Warner Comments at 30.

[524] See, e.g., Adelphia Comments at 50-51; Comcast Comments at 29; Continental Comments at 35-36; Falcon Comments at 31; NCTA Comments at 27; Time Warner Comments at 33.

[525] Id.

[526] See, e.g., Atlanta Reply Comments at 3; Ayden Reply Comments at 3; Austin Comments at 46-7; Clinton Reply Comments at 4; Conn. Comments at 7; Dover Comments at 14-15; Georgetown Reply Comments at 3; Greensboro Reply Comments at 3; Greenville Reply Comments at 3; Henderson Reply Comments at 3; Iowa City Reply Comments at 3; Kinston Reply Comments at 3; Laurens Reply Comments at 3; Laurinberg Reply Comments at 3; Municipal Comments at 14-15; NAB Reply Comments at 17-22; NATOA Comments at 42; NMCC Comments at 2; Owensboro Reply Comments at 3; Piscataway Reply Comments at 3; Reidsville Reply Comments at 3; Titusville Reply Comments at 3; Union Reply Comments at 3; Worthington Reply Comments at 3.

[527] Austin Comments at 12-14, Appendix B; CFA Comments at 86-93; NAB Comments at 14-22.

iii. Discussion.

205. As indicated above, the Cable Act of 1992 permits us to place primary weight on rates of systems subject to effective competition as we fashion regulations governing rates for the basic service tier. The statutory findings, the overall structure of the Act, the statutory goal for the basic service tier, and the statutory factors reveal a congressional concern that rates of systems not subject to effective competition may be excessive when compared to rates of systems that are subject to effective competition. Our industry survey reveals that, in fact, non-competitive rates exceed competitive rate levels by approximately 10 percent.[528] There is, therefore, a strong policy basis grounded in the statute and the underlying congressional intent for the Commission to place substantial weight upon the rates of systems subject to effective competition as the primary measure of the reasonableness of rates for the basic service tier.

206. We are not persuaded that the other possible bases for measuring and setting cable service rates would be superior for establishing a standard of reasonableness. Past regulated rates could be considered reasonable because they were subject to local oversight. However, past rates adjusted upward by a general industry index would not account for significant capital outlays incurred since that time, as commenters point out. We believe that adjusting for past capital improvements could require significant regulatory oversight and substantial expenditure of industry and regulators' resources. In addition, a past regulated rates approach would not address systems not in existence in 1986.

207. We also do not believe that average industry rates by themselves can form the basis for defining reasonable rate levels because, by definition, average industry rates merely reflect current rates. However, average industry rates provide a useful measure of the extent to which current industry rates overall exceed competitive levels and thus, by comparison with competitive systems' rates, enable identification of the rate differential between systems subject, and not subject, to effective competition. We also do not believe that average system costs could at this time form the basis for defining the reasonable level of cable service rates. Although the Notice requested such data, there is simply insufficient information in the record to permit identification of typical system costs.[529]

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[528] See n.129, supra.

[529] In the Second Further Notice, however, we will seek further cost information that will enable us to refine the competitive benchmark.

In addition, the need to update, collect, and review average industry cost data may not make this a feasible approach. Accordingly, we conclude that we should determine the reasonableness for rates of the basic service tier by reference to the rates of systems subject to effective competition. We are therefore adopting a benchmark formula based on our analysis of the average rates of systems subject to effective competition. We explain and justify in detail the derivation of this benchmark formula in Appendix E. In general, the formula will be used to calculate the rate that a cable system with a given number of channels, subscribers and satellite-delivered signals would charge if it faced effective competition. This competitive benchmark is expressed as a rate per channel.[530] We explain below how we apply this competitive benchmark to determine the initial reasonable rate for the basic service tier.

BB. System Characteristics

i. Background

208. In the Notice, we asked whether there were specific system characteristics or variables that we could or should use to separate systems into distinct categories for which we should establish different benchmarks and/or define different rates.[531] We stated that such variables might include some of the following characteristics, which we believed might directly affect system costs and, consequently what would be a reasonable rate level: homes passed per mile; number of subscribers; and number of channels. We also asked for comment on what, if any, positive effect would result when rates of systems subject to the same benchmark converge over time to that benchmark. We asked commenters to address whether, if this is undesirable, we should permit individual system adjustment to otherwise widely applicable benchmarks and what measures should and could be established to permit such adjustments.

ii. Comments

209. Newhouse and Time Warner, among others, recommend that a series of benchmarks be established that could segregate different classes of systems to account for such factors including, but not limited to: population density, channel

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[530] In addition to the benchmark formula, we also adopt and provide a table of benchmark rates for systems with a given number of channels, subscribers and satellite systems.

[531] Notice, 8 FCC Rcd at 520, para. 37.

capacity, age of plant, and number of subscribers.[532] NATOA supports establishment of a matrix of benchmark rates based on system characteristics, (e.g., plant miles, channel capacity, population density) so long as franchising authorities could determine which matrix rate its cable system would charge.[533] SDA proposes benchmark breakdowns by system size and supports the use of a matrix based on service, plant architecture, and geography, in order to distinguish between the inconsistencies that exist in prices amongst large and small basic tiers.[534] Municipalities also support development of a methodology that incorporates differences in basic cable system information. For example, the municipalities propose that the number of active cable channels received by subscribers should be a major component in determining a reasonable rate.[535]

iii. Discussion.

210. Our analysis of cable industry rates reveals that the variance in rates charged by cable systems nationwide can be explained in large part by three key system characteristics: the number of channels offered by the system; the number of subscribers it serves; and the number of satellite-delivered signals.[536] Accordingly, we have developed a benchmark formula for use during this initial phase of rate regulation that incorporates these three system characteristics. Our survey data do not provide a sufficient basis for identifying additional system characteristics that should be incorporated in our benchmark formula. However, as we obtain new information and

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[532] CIC Comments at 19-30; Mesa Comments at 4; NATOA Comments at 43; Newhouse Comments at 13-16; Northland Comments at 7; Small Systems Comments at 6; ThousandOaks Comments at 4.

[533] NATOA Comments at 43.

[534] SDA Comments at 4, 9-10.

[535] See, e.g., Atlanta Reply Comments at 3; Ayden Reply Comments at 3; Clinton Reply Comments at 3; Fairborn Reply Comments 3; Georgetown Reply Comments at 3; Greensboro Reply Comments at 3; Greenville Reply Comments at 3; Henderson Reply Comments at 3; Iowa City Reply Comments at 3; Kinston Reply Comments at 3; Laurens Reply Comments at 3; Laurinburg Reply Comments at 3; Owensboro Reply Comments at 3; Piscataway Reply Comments at 3; Reidsville Reply Comments at 3; Titusville Reply Comments at 3; Union Reply Comments at 3; Worthington Reply Comments at 3.

[536] These three system characteristics accounted for over 60 percent of the variance in rates accross all systems. See Appendix E.

data, and as we gain more experience with cable rate regulation, we may reevaluate this conclusion.

CC. Application of the Benchmark to Determine Initial Regulated Rate Levels.

i. Background.

211. As indicated, in the Notice, we proposed an approach for rate regulation of cable service rates under which we would establish a benchmark rate, or simple formula that could be used to derive such a rate.[537] We stated that the benchmark would permit identification of systems with presumptively unreasonable rates, while establishing a zone of reasonableness for systems with rates below the benchmark level.

ii. Comments.

212. Many commenters support use of a benchmark to determine the reasonable rate level for the basic service tier.[538] While some commenters oppose use of a benchmark to govern rates for the basic service tier,[539] and some commenters favoring the benchmark approach favored particular methodologies for establishing the benchmark rate,[540] no commenters challenged

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[537] See Notice, 8 FCC Rcd at 519-520.

[538] See generally, AdelphiaII Comments at 53-56; AEN Comments at 9; AG's Comments at 3-5; Armstrong Comments at 16-17; Bell Atlantic Comments at 6-8; BellSouth Comments at 3; CalCities Comments at 16; Carib Comments at 5; CATA Comments at 14; CIC Comments at 11-12; Cole Comments at 25-26; Comcast Comments at 29-32; Cox Comments at 8-11; Falcon Comments at 24-27; Mesa Comments at 4; NATOA Comments at 40; Newhouse Comments at 10; NJ Comments at 7; Northland Comments at 6; Oxnard Comments at 4; Prime Comments at 4; Schaumburg Comments at 7-8; Spring Comments at 1-2; Tallahassee Comments at 2; TCI Comments at 15-22; TIA Comments at 19; Time Warner Comments at 15; USA Comments at 3-9.

[539] Baltimore Comments at 8-9; Commerce Comments at 6-8; Dennison Comments at 2; Minn. Comments at 10; Montana Comments at 2; Randolph Comments at 1-2; Rocky Comments at 3.

[540] See, e.g., AG's Comments at 6-8; Atlanta Reply Comments at 2-3; Austin et. al. Comments at 41-43, 46-47; Ayden Reply Comments at 2-3; Bayonne Reply Comments at 8-9; Bell Atlantic Comments at 6-8; BellSouth Comments at 2-7; CFA Comments at 87-89; Clinton Reply Comments at 2, 4; Comcast Comments at 29; Conn. Comments at 7,9; Continental Comments at 29-33; Dover Comments at 14-15; Fairborn Reply Comments at 2; Georgetown Reply Comments at 2-3; Greensboro Reply Comments at 2-3; Greenville Reply Comments at 2-3; Henderson

the concept of a benchmark consisting of a rate or a simple formula to define a rate, which would, in turn, define an upper limit, below which basic tier rates can be found reasonable without further analysis.

iii. Discussion.

213. As noted above, we conclude that the best means of implementing rate regulation for cable systems not facing effective competition is to apply a benchmark formula that will enable us to determine what rates would be charged by similarly-situated systems that do operate in a competitive marketplace. We accordingly will require regulated cable systems to use our benchmark formula to calculate the competitive benchmark for a given system. Actual rates that are at or below this competitive level will be deemed to be reasonable. Thus, as explained below, if a system's actual rates are below its benchmark level on the day regulation begins, the system will not be required to reduce its rates, although any future rate increases will be subject to a price cap. By contrast, actual rates above the competitive level, as determined by the benchmark formula, will be deemed to be presumptively unreasonable. Accordingly, if a system's rates are above its benchmark level when regulation begins, it will either have to reduce its rates by amounts specified in our rules in order to be found reasonable, or submit a cost-of-service showing to justify the unreduced rates. Requests for future rate increases by these systems will also be subject to our price cap scheme.

214. Applying the Benchmark Formula. In essence, the benchmark formula is applied by inserting three characteristics of a given cable system -- the number of channels, subscribers and satellite-delivered signals -- into a mathematical equation. (As noted in the preceding section, our cable rate survey revealed that it is these three system elements that account for much of the variance in rates charged by different cable systems nationwide). The rate resulting from the benchmark formula, which will be expressed as a per channel rate, represents the rate that a competitive cable system with the same characteristics as the system subject to regulation would charge.

Reply Comments at 2-3; Iowa City Reply Comments at 2-3; Kinston Reply Comments at 2-3; Laurens Reply Comments at 2-3; Laurinberg Reply Comments at 2-3; MCATC Comments at 8; Municipal Reply Comments at 14-15, 24; NAB Reply Comments at 17-22; NATOA Comments at 41-42; NCTA Comments at 17-19, 24-26; NMCC Comments at 2-3; Owensboro Reply Comments at 2-3; Piscataway Reply Comments at 2-3; Reidsville Reply Comments at 2-3; San Diego Comments at 4; Schaumburg Comments at 8; Thousand Oaks Comments at 14-15; Time Warner Comments at 3, 24; Titusville Reply Comments at 2-3; Union Reply Comments at 3; Worthington Reply Comments at 2-3.

As noted previously, the formula is set forth and explained in Appendix E of this Report and Order. However, in order to assist operators and regulators in applying the formula, and to ensure its uniform application, we have developed FCC Form 393 that sets forth precisely how the formula is to be used in calculating the permitted rate for a regulated cable system. This form, which is included in Appendix D, must be used when systems submit their basic rate schedule for review to local franchise authorities (or the Commission, where it is regulating basic rates). Similarly, the form must be used by cable operators when responding to subscriber complaints filed at the FCC concerning cable programming service rates.

215. Having applied the benchmark formula to determine a given system's competitive per channel rate, the system must then calculate its current per channel rate using the same methodology so that it may be compared to the competitive benchmark. Form 393 sets forth the precise computations that should be made to ascertain the system's rate per channel as of the initial date of regulation.[541] We now turn to a discussion of how we will treat cable systems whose existing basic service rates are either below or above their competitive benchmarks on the date regulation begins.

216. Systems Below the Benchmark. We first conclude that, where a regulated cable system is not charging rates that are above competitive levels, as determined by our benchmark formula, there is no reason to assume that its rates reflect undue market power even in the absence of effective competition. We determine, therefore, that we should generally presume that basic service tier rates that are at, or below, the benchmark level on the date regulation begins are reasonable. Thus, the benchmark will define a broad zone of reasonableness for rates below the benchmark. We will not require any reductions for basic tier rates that are at or below the system's benchmark

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[541] The rate form prescribes in detail how cable operators will determine their current per channel rate (and, where necessary, their September 30, 1992 per channel rate). In summary, the cable operator will divide the total monthly revenues by the number of channels on both basic and cable programming service tiers. Adjustments are also prescribed for equipment revenues and franchise fees. (Equipment revenues are added to other revenues because the benchmark data are based on prices including equipment revenues. Any revenues to recover franchise fees are excluded because the survey data on which the benchmark is based exclude franchise fees). The resulting per channel charge is then compared to the benchmark. This calculation is tier-neutral in that it is an average across all tiers.

level at the time the system becomes subject to regulation.[542] Therefore, the initial regulated rate for a system with per channel rates below the benchmark on the date on which the system becomes subject to regulation shall be its rate in effect on that date, regardless of how far below the benchmark those rates may be.[543]

217. Systems Above the Benchmark. By contrast, we believe that basic service rates that exceed the system's benchmark level at the time regulation begins are presumptively unreasonable because they exceed the average rates charged by systems subject to effective competition. In order to produce basic tier rates on an industry-wide basis that is close to reasonable levels, we conclude that rates above the benchmark should be reduced by 10 percent (or to the benchmark, whichever is less).[544] This rate reduction will enable us to recapture, for subscribers' benefit, the competitive rate differential that we found to exist across the industry between rates charged by systems facing effective competition and those that do not. A rate reduction of up to 10 percent for above-benchmark rates will thus bring those rates considerably closer to competitive levels, in accordance with Congressional intent.

218. We also conclude that the reductions required for systems with basic rates above the benchmark should be made from the rates in effect on September 30, 1992.[545] Our reasons for this are two-fold. First, the rate survey data from which our benchmark formula was derived reflect rates in effect on

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[542] Our benchmark formula is based on cable system rates in effect on September 30, 1992. We will therefore compare systems' current rates to the benchmark rates produced by the formula, adjusted forward by inflation. The adjustment forward for inflation is prescribed in FCC Form 393. We find no basis for requiring a rollback for systems that have raised rates from September 30, 1992 levels to the extent the increased rates are still below the benchmark on the date regulation begins.

[543] Cable operators become subject to regulation by local franchising authorities on the date the local authority notifies the operator that it is certified and has adopted the requisite regulations. See Section II.A.3.a(2)(c), supra.

[544] We will not require rates to be reduced below the competitive benchmark because the benchmark represents the upper limit of systems' presumptively reasonable rates. In addition, no rollbacks of rates are necessary for systems with below benchmark rates as long as they remain at the time of regulation still below the benchmark.

[545] See n.541, supra.

September 30, 1992. Thus, to ensure that an appropriate comparison is made when analyzing systems with above-benchmark rates, we will use the actual rates that were in effect for the system on that same date. Second, we are concerned that systems whose rates are above the benchmark -- and are thus presumptively unreasonable -- may have implemented unjustified rate increases after the 1992 Cable Act was passed in October 1992 but before we were able to adopt our rate regulation standards.[546] Accordingly, to protect subscribers from potentially unwarranted rate increases that may have occurred since September 30, 1992, we will set the reasonable rate level for systems with above-benchmark rates at the September 30, 1992 rates, reduced by 10 percent or to the benchmark, whichever yields the higher rate level.

219. We recognize that we could have required all systems with rates above the applicable benchmark to reduce rates to the benchmark level. This approach would have meant that systems that are far above the competitive rate level would have steep rate reductions while those only somewhat above the competitive level would not. However, we believe that such an approach would ignore the possibility that some systems' high rates may be based at least in part on higher costs, thus encouraging unweidly and expensive cost-of-service showings. Given our plans to further refine the benchmark and to collect more data on system costs, we prefer to take a more cautious approach to initial cable rate regulation.

220. Therefore, instead of requiring all systems to reduce rates to benchmark levels, we will take other steps to identify correct rate reductions for systems with rates more than 10 percent above the benchmark. First, we will conduct further surveys to refine the competitive benchmark and to assess and determine more precisely the competitive rate differential between systems subject, and not subject, to effective competition. We will also gather certain specific cost information from a sample of representative cable systems. In the Further Notice, we will also examine whether we can, or should, exclude from our competitive benchmark analysis those systems with less than 30 percent penetration. Excluding those systems from our competitive sample could significantly increase the extent to which cable systems' rates would appear to exceed competitive levels, and may require further rollbacks. In addition, systems that are substantially above the benchmark even after the rate rollbacks will be subject to special scrutiny through cost-of-service investigations.

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[546] In a separate Order, FCC 93-176 (released April 1, 1993), we imposed a temporary rate freeze on regulated cable rates to ensure that rates do not increase further while our regulatory regime gets underway.

221. Finally, we note that some systems which have rates above the benchmark when regulation begins may have had rates that were below the benchmark on September 30, 1992. Such systems will not be subject to a rollback from levels in effect on September 30, 1992 because the rates were presumptively reasonable on that date, i.e., they were below the benchmark. We determine that the reasonable rate for such systems will be the benchmark rate. Thus, while those systems must reduce rates from existing levels, they may retain any increases from September 30, 1992 levels up to the benchmark.

222. The foregoing determinations define the initial permitted rate for the basic service tier when the system becomes subject to regulation. Those systems whose initial rates would be their September 30, 1992 rates, as reduced by the required amount, may further adjust those rates to reflect inflation occurring between September 30, 1992 and the time when regulation of the basic service tier begins. They must also apply an efficiency adjustment to those rates if the total number of channels on the system has changed from September 30, 1992 to the time of regulation. In general, because prices per channel tend to decline as the number of channels increases, and because our survey reveals that cable service rates tend to decline as system size and number of subscribers increase, the permitted charge per channel will decrease as the total number of channels increases. All of these adjustments are prescribed in FCC Form 393. After those adjustments are made, the initial permitted rate for the basic service tier will then be capped as we describe in the next section.

(f) Adoption of the Price Cap

223. In this section, we impose price cap requirements to govern rate increases for the basic service tier once the initial regulated per channel rate has been determined as explained in the preceding section. First, we address the general question of whether we should rely upon a price cap regime to govern rates for the basic service tier once the initial regulated rate has been determined. We then discuss how the cap will apply to systems with initial rates below the competitive benchmark; the annual adjustment index for the cap; and external costs for which recovery will not be limited by the cap, i.e., costs that cable operators may pass on directly to subscribers through increases to its otherwise capped rate without a cost-of-service showing.[547]

AA. In general

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[547] However, our procedural rules for regulation of the basic service tier provide for review by local franchise authorities of proposed rate increases based on these "external" costs.

i. Background.

224. In the Notice we solicited comment on whether we should apply a price cap to govern rate increases by cable systems.

ii. Comments.

225. Telephone companies and TIA aver that the Commission should apply price cap regulation to basic cable rates once existing rates are set at a reasonable level, either under benchmarks or cost-of-service regulation.[548] According to Bell Atlantic and BellSouth, a price cap scheme should be imposed on cable operators similar to the existing price cap regulation on telephone companies. They claim it would encourage improvements in productivity and efficiency, and promote deployment of new technologies.[549] Moreover, the telephone companies contend that a price cap structure would limit the cable industry's incentive to cross-subsidize and would lessen the administrative burdens on subscribers, cable operators, and franchising authorities by eliminating the need for annual rate reviews.[550]

226. Cable operators and others argue against instituting a price cap structure on the cable industry.[551] Cole and Continental contend that price caps does not properly account for the differences between the cable and telephone industry.[552] For example, Cole and Continental state that unlike the telephone industry, cable is not a declining cost business, nor does it have a regulatory history from which appropriate price caps could be established.[553] Armstrong adds that application of price caps to cable would be difficult without uniform accounting methods in

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[548] See, e.g., Bell Atlantic Comments at 4-6; BellSouth Comments at 10-16; NYNEX Comments at 6-9; TIA Comments at 22.

[549] Bell Atlantic Comments at 4-6; BellSouth Comments at 10-13.

[550] Id. The telephone companies assert that any price cap structure for cable operators should contain a "productivity offset" that would require annual rate decreases in real inflation-adjusted terms.

[551] See, e.g., AdelphiaII Comments at 61; Armstrong Comments at 16-17; Austin Comments at 47; Cole Comments at 23-24; Comcast Comments at 29; Discovery Comments at 9-10; Falcon Comments at 31-32; NMCC Comments at 4; Rapids Comments at 28-29; TimeWarner Comments at 31.

[552] Cole Comments at 23-24; Continental Comments at 25-26.

[553] Id. See also Discovery Comments at 9-10.

place.[554] In addition, Time Warner believes price caps would be inappropriate due to its historic reliance on cost-of-service regulation.[555]

iii. Discussion.

227. The Cable Act of 1992 reflects a congressional concern that rates for cable service since rate deregulation have increased to an unreasonable degree exceeding the overall rate of inflation because of a lack of effective competition in the industry.[556] We believe that a price cap mechanism applied to the initial regulated rate level will assure that future rate increases remain reasonable. At the same time, adjustments to recover costs attributable to inflation and other factors beyond an operators control will assure that the cap does not unfairly restrict cable operators' ability to recover costs. The provision allowing cost-of-service showings will also assure that cable operators can recover appropriate costs of service where necessary.

228. The Commission has found a price cap approach to be an effective alternative to cost-of-service regulation in other regulated areas.[557] Price caps give companies an incentive to reduce costs and operate efficiently. They circumvent the perverse incentives associated with rate of return regulation under which, for example, more expense can mean higher rates, not less profit. In addition, price caps minimize regulatory intervention and reduce the overall administrative burdens imposed on government and on those companies dealing with government. Finally, with its emphasis on prices, a price cap alternative permits companies reducing costs faster than the industry, or the nation as a whole, to earn higher profits than other companies. This will encourage cable operators to operate

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[554] Armstrong Comments at 17.

[555] Time Warner Comments at 20.

[556] Cable Act of 1992, § 2 (a)(1).

[557] See Notice, 8 FCC Rcd at 523, para.51-52; see also Policy and Rules Concerning Rates for Dominant Carriers, CC Docket 87-313, Report and Order and Second Further Notice, 4 FCC Rcd 2873 (1989) ("Price Cap Order") and Erratum, 4 FCC Rcd 3379 (1989), modified on recon. 6 FCC Rcd 665 (1991) rev'd in part on other grounds AT&T v. FCC, 974 F.2d 1351 (D.C. Cir. 1992); Second Report and Order, 5 FCC Rcd 6786 (1990) ("Second Price Cap Order") and Erratum, 5 FCC Rcd 7664 (1990), modified on recon. 6 FCC Rcd 2637 (1991), aff'd Nat'l Rural Telecom Assoc. v. FCC, No. 91-1300, (D.C. Cir. 1993).

efficiently.[558] We believe that these benefits of price caps should be extended to cable service. Accordingly, we will adopt a price cap regime to govern changes in rates from initial regulated levels.

229. We additionally determine that the price cap rate for the basic service tier will be expressed as a rate per channel. A rate expressed as a rate per channel will facilitate rate calculations and review by cable operators, franchising authorities and the Commission because the initial rate to which the cap will be applied is expressed as a rate per channel and because a rate per channel is relatively easy to calculate. With a cap expressed as a rate per channel we can also more easily refine the price cap structure to reflect additional individual system characteristics if our experience with rate regulation of the cable industry appears to warrant such adjustments.

BB. Application of the Cap to Systems with Current Rates Below the Benchmark

i. Background.

230. In the Notice, we asked whether we should impose a price cap to limit how quickly systems with rates below the benchmark could raise their rates to that benchmark price. We asked for comment on what such a price cap formula should be.[559]

ii. Comments.

231. Cable operators and certain municipalities oppose applying price caps to those systems that charge below the benchmark rate.[560] Cable operators argue that instituting price caps in this circumstance would only serve to penalize "good actors" with the lowest rates, and reward those operators with the highest initial rates.[561] They contend that operators with

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[558] We will explore in the Second Further Notice whether we should include among our price cap mechanisms a productivity factor to assure that subscribers benefit when a cable system operates more efficiently under capped rates.

[559] See Notice, 8 FCC Rcd at 520, para 34.

[560] See, e.g., AdelphiaII Reply Comments at 24; CATA Comments at 20-21; Dover Comments at 9-10; NATOA Comments at 45; NCTA Comments at 29-31; Newhouse Comments at 15; Time Warner Comments at 24.

[561] AdelphiaII Reply Comments at 24; CATA Comments at 20-21; NCTA Comments at 29-31; Newhouse Comments at 15.

low rates are unlikely to suddenly impose excessive rate increases, but that these "good actors" would be punished by limiting their ability to increase rates to the benchmark, which, by definition, is a reasonable rate. NCTA adds that if implemented, this measure could give "good actors" a perverse incentive to raise rates to the highest permissible level whether necessary to cover costs or not in order to maximize their flexibility to cover subsequent cost increases.[562] NATOA and Dover claim that applying a price cap mechanism to those below the benchmark would not be appropriate because the fact that cable operator is charging that lower rate suggests that the lower rate is reasonable.[563] On the other hand, other municipalities assert that cable operators with rates below the benchmark should be subject to annual price caps so that subscribers are not faced with automatic and substantial rate increases.[564]

iii. Discussion.

232. We conclude that Congress intended that subscribers pay no more for basic service than they would if their cable system were subject to effective competition. It is reasonable to assume in most cases that, whatever the rate an operator not subject to effective competition is charging for basic service, such a rate is not unreasonably low from that operator's perspective. Indeed, the rate level was voluntarily selected by the operator, who faces no effective competition, at a time before rate regulation began. The fact that the rate is less than the maximum amount entitled to our presumption of reasonableness does not change the validity of our assumption that the rate is not unreasonably low. It also appears reasonable to conclude that the rate is not less than the operator would charge if subject to effective competition. For these reasons, we are not persuaded that every cable operator with basic rates below the benchmark at the time of regulation should be able to raise its rates towards or up to that limit, without a cost showing to justify that increase. Accordingly,

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[562] NCTA Comments at 29.

[563] NATOA Comments at 45.

[564] See, e.g., Atlanta Reply Comments at 3; Ayden Reply Comments at 3; Bayonne Reply Comments at 8; Clinton Reply Comments at 5; Fairborn Reply Comments at 3; Georgetown Reply Comments at 3; Greensboro Reply Comments at 3; Greenville Reply Comments at 4; Henderson Reply Comments at 3; Iowa City Reply Comments at 3; Kinston Reply Comments at 3; Laurens Reply Comments at 3; Laurinberg Reply Comments at 3; Owensboro Reply Comments at 3; Piscataway Reply Comments at 3; Reidsville Reply Comments at 3; Titusville Reply Comments at 3; Union Reply Comments at 3.

those systems with rates in effect on the date regulation begins that are below the benchmark, as calculated pursuant to FCC Form 393, are not subject to rollbacks but will nonetheless have their rates capped at the level in effect on that date. Rate increases for such systems will then be subject to price caps on a going-forward basis.

CC. Annual Adjustment Index

i. Background.

233. In the Notice, we asked commenters to address what annual index the Commission should adopt to measure accurately the general change in the cost of doing business.[565] We tentatively concluded that although such changes are generally represented by the general consumer price index (CPI) or producer price index (PPI), a local service price index (LSPI) would be more accurate for adjusting cable rate benchmarks. We solicited comment on this tentative conclusion, and requested that commenters also address what the composition of a LSPI should be, how such an index would be created, what services should be included, where data would come from, and what geographical area would be appropriate for comparison.

ii. Comments.

234. Cable operators, programmers, consumer advocates, and others advocate that periodic adjustments are vital to the success of any rate regulation structure.[566] Commenters urge the Commission to adopt a simple and appropriate index, such as the CPI[567] or LSPI[568], that could adjust the benchmark on an annual basis to account for cost changes. Several cable operators support the adoption of an inflation index but did not identify a

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[565] Notice, 8 FCC Rcd at 520, para. 38.

[566] See, e.g., AdelphiaII Comments at 61-62; Armstrong Comments at 20-21; Blade Comments at 8; Carib Comments at 7; CFA Comments at 89-91; CIC Comments 19-30; Cole Comments at 25-26; Continental Comments at 28; Comcast Comments at 30-31; Cox Comments at 15-22; ESPN Comments at 8; Falcon Comments at 31-32; Lifetime Comments at 12; Media General Comments at 10; NCTA Comments at 31-33; NATOA Comments at 43; Newhouse Comments at 13-15; Northland Comments at 10-24; SDA Comments at 4, 9-10; Small Systems Comments at 6; TCI Comments at 33-36; Thousand Oaks Comments at 6-7.

[567] See, e.g., AdelphiaII Comments at 61-62; Armstrong Comments at 20-21; NCTA Comments at 31-33; SDA Comments at 4, 9-10; TCI Comments at 33-36.

[568] See, e.g., Carib Comments at 7; Falcon Comments at 31-32.

preferred index.[569] SDA prefers the CPI over the LSPI, since it claims that inflation's impact is felt more in the value to its subscribers of an individual system than in particular localized costs.[570] Cole also favors adoption of the CPI adjustment factor and argues that the LSPI seems unnecessarily complicated.[571] Adelphia asserts that the Commission should adopt the "admissions" component of the CPI, since it measures the price of services competitive with the cable industry such as movies, theater, and sporting events.[572] Programmers contend that the annual adjustment index should reflect inflation in entertainment services, which they maintain is higher than the CPI measurement.[573]

235. Other commenters oppose using either a CPI or LSPI as an adjustment price index.[574] CFA, for example, asserts that the Gross National Product Price Index (GNP-PI) is a superior index that should be used as an inflator for future rate changes. Media General, however, contends that the American Chamber of Commerce Research Association (ACCRA) cost-of-living index provides a better measurement of nationwide costs than a LSPI.

iii. Discussion.

236. After reviewing the record on this issue, we will not adopt an LSPI as the annual adjustment to the benchmark at this time. Such an index, because it could be more closely tied to local costs, could provide a more accurate measure of increases in the local cost of doing business than would a national index. However, the record does not contain the information we would need to fashion an LSPI. In particular, the commenting parties did not provide information that easily translates to localized cost standards. The ACCRA index suggested by Media General provides cost-of-living comparisons for 300 metropolitan areas. Many cable franchises are not in, or near, one of these 300 metropolitan areas. The cost of living comparisons are based on sample local prices, which do not

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[569] See, e.g., Blade Comments at 9; CIC Comments at 19-21; Continental Comments at 28; Comcast Comments at 30-31; Cox Comments at 15.

[570] SDA Comments at 4, 9, 10.

[571] Cole Comments at 25-26.

[572] AdelphiaII Comments at 61-62.

[573] See, e.g., ESPN Comments at 8; Lifetime Comments at 12.

[574] See, e.g., CFA Comments at 89-91; Media General Comments at 10.

necessarily bear any relation to the cost of providing cable service. The local cost of living might correlate with local wage rates, but some cable operations may not be located within the actual franchise territory. Furthermore, payroll and benefits account for less than a fourth of cable operating expenses.[575] And our analysis of our survey data did not address geographic variables. We could not, therefore, define and calculate an LSPI index based upon those data within the statutory deadlines by which we have had to craft the framework for basic tier rate regulation. Accordingly, we will adopt an annual adjustment index based on a national index.

237. An annual adjustment index will permit changes in each system's cap for the basic service tier based on general changes in the cost of doing business. Establishment of such an index will help achieve the statutory goal of reducing administrative burdens on cable systems, consumers, and regulators by permitting rate increases when cable operators experience increases in the cost of doing business shared by all sectors of the economy, without requiring cable operators to make, and regulators to consider, cost-of-service showings. Adjusting the cap to reflect commonly shared increases (or decreases) in the cost of doing business will help assure that cable operators can earn a reasonable profit despite general price increases without having to initiate a cost-of-service proceeding. We observe that there is broad recognition in the comments of the need for an annual adjustment index to reflect general increases in the cost of doing business.

238. We conclude that we should adopt an annual adjustment index that measures changes in overall inflation rather than selecting an index for an industry for which costs are likely to be similar to the cable industry. A telephone service or other public utility price index might logically serve as a surrogate measure of changes in the cost of providing cable television service. The telephone industry is similar to the cable industry in several respects. Both industries are capital intensive with depreciation accounting for between 20 percent and 25 percent of annual operating expenses. Both industries have significant investments in the local physical plants. Unlike most other public utilities, telephone companies and cable operators are not especially sensitive to changes in energy costs. The most significant difference in the two industries is that a significant proportion of the cost of providing cable service is attributable to programming costs. Nonetheless, we

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[575] The U.S. Department of Commerce Annual Survey of Communication Services: 1990 shows total operating expenses of $21,892 million, Annual Payroll of $3,832 million, and social security and fringe benefits of $1,484 million. U.S. Bureau of the Census, Annual Survey of Communication Services: 1990 (1991).

reject the use of telephone indexes because these indexes reflect the fact that productivity increases in the telephone industry have traditionally outstripped productivity increases in the overall economy.[576] The record does not provide a basis to expect the same productivity gains in the cable industry.[577] Moreover, to the extent that some productivity gains in the cable industry arise from increased system capacity, the use of per channel rates, which decline with the number of channels, our benchmark formula already reflect this source of productivity gain. Accordingly, we will use a measure of overall inflation as the annual adjustment index for cable service rates. However, we will seek comment on other approaches in the Second Further Notice.

239. We conclude that we should adopt the GNP fixed weight price index (GNP-PI) as the annual adjustment index for the cap for the basic service tier rates.[578] This index measures the effects of price changes in the whole economy and provides a broader measure of overall inflation than does the Consumer Price Index for all items (CPI), or the Producer Price Index for finished goods (PPI), two other commonly used measures of inflation. The CPI reflects the prices paid by households for the services used in everyday living and does not represent changes in prices paid by businesses. The PPI covers goods sold to both households and businesses, but covers relatively few services. The GNP-PI incorporates both types of indexes as well as other measures of inflation in the economy.

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[576] This fact is reflected in our price cap annual productivity adjustments. The adjustment is 3 percentage points for AT&T and 3.3 percentage points for the Local Exchange Carriers.

[577] We observe, however, that one commenter states that productivity increases in the cable industry have exceeded productivity increases in the telephone industry. Continental Comments at Appendix C. However, the record does not provide sufficient information for incorporation of a productivity offset into our price cap mechanism at this time. We will examine whether to adopt a productivity offset in the Second Further Notice.

[578] The Bureau of Economic Analysis (BEA) produces two fixed weight indexes that measure inflation in the overall economy. The GNP-PI measures inflation in the gross national product. The Gross Domestic Product fixed weight price index (GDP-PI), which BEA began producing recently, measures inflation in the domestic national product. The GNP-PI is an appropriate measure of inflation that the Commission currently allows telephone companies to use for inflation adjustment in annual price cap filings. U.S. Department of Commerce, Bureau of Economic Analysis, Survey of Current Business: August 1991.

240. Under our rules, regulated cable operators may adjust the capped base per channel rate for the basic service tier annually by the GNP-PI. This adjustment will permit cable operators to recover the past year's inflation in the rates for the succeeding year. We believe that this approach represents the best balance between the administrative burdens imposed by more frequent rate adjustments and the need to permit prompt adjustments for inflation. We do not believe that this will cause a hardship to cable operators because they will be able to adjust within one year for inflation occurring in the first quarter of the preceding year, and for subsequent quarters more promptly. We require that the adjustment be based on the final GNP-PI index rather than interim indexes.[579] We will permit adjustments for inflation for the part of the year between the initial date of regulation and the beginning of the next year. The manner of calculating the adjustments will be prescribed in FCC forms.

(g) External Costs

241. In this section we identify the categories of costs that cable operators may "pass through" to subscribers without a cost-of-service showing even if resulting rates exceed the applicable price cap. For cost reductions in these categories, however, cable operators must make rate reductions to reflect such savings. We explain below why this regulatory treatment for these categories of costs is reasonable.

(g)(1) Retransmission Consent Fees

i. Background

242. In the Notice, we sought comment on how we should take into account retransmission consent compensation in establishing regulations governing rates for the basic service tier, while also satisfying our obligation to ensure that such rates are reasonable. We tentatively concluded that we could fully discharge our obligation under the Cable Act to consider the impact of retransmission consent by successfully balancing the enumerated statutory factors, including the direct costs of carrying broadcast signals.[580]

ii. Comments

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[579] The BEA issues an interim index for the previous quarter 75 days after the quarter ends followed by the final index 90 days after the previous quarter.

[580] See Notice, 8 FCC Rcd at 518, n.60.

243. MPAA, NAB and NYSCCT concur with the Commission's tentative conclusion that the costs of retransmission consent should be included in the basic service tier rate.[581] NAB asserts that if the Commission selects a benchmark regulatory structure, costs of retransmission consent should not result in an increase in basic tier rates since cable rates already reflect the value of broadcast signals.[582] NAB adds that the Commission should first remove from the permitted rate level the value of retransmitted signals, before increasing a rate-based benchmark based on retransmission consent fees, so that cable operators are not unjustly enriched.[583] Oxnard contends that the Commission, in balancing the statutory factors used to promulgate reasonable rates, should assign less weight to the retransmission consent issue than to the other factors.[584]

244. Cable operators stress that they should be permitted to directly pass through retransmission consent fees.[585] NCTA argues that an automatic pass-through of retransmission consent fees would be consistent with the Cable Act since this is a readily identifiable new expense that Congress has ruled to be legitimate.[586] Media General also asserts that an automatic pass-through would be equitable to cable operators since it would allow the operator to cover its costs and would encourage the cable operator to add program services to the basic service tier.[587]

iii. Discussion.

245. Treating retransmission consent fees as costs external to the cap would permit cable operators to pass such costs on directly to consumers without a cost-of-service showing. If not treated as costs external to the cap, cable systems could increase rates to recover these fees only if higher rates were justified based on an overall cost-of-service showing. Not treating retransmission consent fees as external costs may

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[581] MPAA Comments at 2; NAB Comments at 5; NYSCCT Comments at 12-13.

[582] NAB Comments at 5-7.

[583] Id.

[584] Oxnard Comments at 3.

[585] See, e.g., Media General Comments at 9; NCTA Comments at 44.

[586] Id.

[587] Media General Comments at 9.

provide a greater incentive for cable operators to negotiate aggressively for the lowest fee to which a broadcaster would agree. At the same time, however, such an approach may increase the risk that a broadcast signal may not be available on the basic tier if the broadcaster and the cable operator are not able to reach an agreement on a fee for retransmission consent. Treating retransmission consent fees as costs external to the cap, on the other hand, could encourage broadcasters to elect retransmission consent and provide greater assurance that the signals of such broadcasters will be on the basic tier because cable operators will be able to increase rates to recover these specific costs.

246. We conclude that, after the initial transition to retransmission consent is completed, treating retransmission consent fees as external costs strikes the best balance between these conflicting considerations. While cable operators may have less incentive to drive a hard bargain, they will still have strong incentives to assure that, overall, the rates for the basic service tier are reasonable and thus negotiate reasonable retransmission consent fees. This approach will also provide greater assurance that signals of broadcasters electing retransmission consent will be available on the basic service tier.

247. At the same time, however, we are persuaded that current cable rates reflect the value of broadcast signals to cable operators. Moreover, we are concerned that external treatment during the initial period in which cable operators and broadcasters enter their first retransmission consent agreements may not encourage fair bargaining for reasonable retransmission consent fees. This is particularly true during the first round of negotiations because retransmission consent is a new regulatory and statutory mechanism with which we and the affected industry have no experience. We also believe that a delay in the onset of external treatment for retransmission consent fees will protect subscribers from any precipitous increase in rates after October 6, 1993, the date on which new retransmission consent agreements go into effect. Accordingly, external treatment for retransmission consent costs will commence only after October 6, 1994 and the permitted pass-throughs will be limited to the new or additional fees beyond those already in effect on October 6, 1994.[588] We will closely monitor initial retransmission consent

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[588] Under our retransmission consent requirements, the initial period for retransmission consent agreements will run from October 6, 1993 until October 6, 1996. See Implementation of the Cable Television Consumer Protection and Competition Act of 1992 - Broadcast Signal Carriage Issues, Report and Order, 58 FR 17350, Released April 2, 1993. Thus, the limitation on external treatment until October 6, 1994 will apply to fees that cable operators will

agreements for their potential impact on subscriber rates.[589] If it appears that additional measures are needed to assure that pass-through of retransmission consent fees does not have an unwarranted impact on basic tier rates, we will reexamine this treatment of such fees.

248. The Cable Act of 1992 requires that we take into account the costs of retransmission consent in fashioning regulations to assure reasonable rates for the basic service tier. We conclude that we should take such costs into account by treating them, to the extent indicated above, as costs external to the benchmark.

BB. Other External Costs

i. Background

249. In the Notice, we also asked whether, depending on the ratemaking methodology adopted, certain price changes caused by factors outside of the cable operator's control should not be deemed price "increases" subject to the notice requirement, and should be permitted to be automatically passed-through without prior regulatory review.[590] We specifically asked commenters who advocate such an approach to fully discuss its relationship to the ratemaking methodology recommended.

ii Comments

250. NCTA, CCTA, and CIC argue that any financial obligation imposed upon a cable operator by a governmental entity should not be factored into the benchmark rate, but should be passed on directly to cable subscribers.[591] CIC asserts that since the Cable Act allows these costs to be itemized individually on cable subscriber's bills, this evidences Congress' intent that these are separate and distinct charges

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pay to broadcasters during the first year of their retransmission consent agreements.

[589] See Senate Report at 35-36.

[590] Notice, 8 FCC Rcd at 529, para. 83.

[591] CCTA Reply Comments at 2; CIC Reply Comments at 15; NCTA Comments at 43-44. Municipal contends that although it generally opposes automatic pass-throughs, governmentally imposed costs should be separated from the benchmark so that no cable operator either is penalized or profits from the treatment of such costs by different jurisdictions. Municipal Reply Comments at 23.

from the costs that should be factored into the benchmark.[592] NCTA avers that cable system operators should add to their applicable benchmark any government mandated franchise fees, taxes, fees or assessments, as well as PEG and similar costs, on a prorated per-channel basis.[593] Discovery maintains that cable operators should also be allowed to pass-through their increased costs for programming and system improvements such as channel expansion or technology upgrades.[594] In addition, Minn. states that cable operators should be permitted to pass through all obvious and readily identifiable price increases since they would also have to reduce rates as a result of price decreases.[595]

iii. Discussion

251. Programming Costs other than Retransmission Consent Fees. In the Notice we sought comment on how rate regulation would affect the ability of cable programmers to provide programming services to the public. Cable operators generally contend that rate regulation could significantly limit their ability to incur additional costs of obtaining programming.[596] The record shows that programming costs have increased at a rate far exceeding the rate of inflation.[597] While operators could justify increased rates under a cost-of-service showing, we are concerned that regulation of basic service tier rates, at least during the early stages of rate regulation, might inadvertently harm the continued ability of programmers to develop and produce programming.[598] Capping rate increases at GNP-PI also would ignore the faster rate of increase in programming costs. Treatment of programming cost increases as external costs would assure programmers' continued ability to develop, and cable operators' ability to purchase, programming. The risk with this approach is that cable operators may incur excessive programming costs and then pass them on to subscribers. We believe, however, that cable operators also have incentives to

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[592] CIC Comments at 15.

[593] NCTA Comments at 41-44.

[594] Discovery Reply Comments at 4-6.

[595] Minn. Comments at 23.

[596] See CIC Comments at 1-11; NCTA Comments at 1.

[597] TCI Reply Comments at 26-27; Lifetime Comments at 12.

[598] House Report at 86 (in discussing regulation of unreasonable rates, the Committee recognized that "since cable rates were deregulated in 1986 there has been an increase in the quality and diversity of cable programming.")

assure that service rates are not excessive since excessive programming costs, if passed on to subscribers, may cause them to lose subscribers. On balance, we attach greater importance at this initial stage of rate regulation to assuring the continued growth of programming. Accordingly, on a going-forward basis, we will allow cable operators to pass through to subscribers increases in programming costs.[599] We will monitor the impact of external treatment of programming cost increases. If it appears that this treatment is resulting in precipitous rate increases or is being harmful, we will take steps to limit these pass throughs, including subjecting costs to the cap.

252. We make one important exception to the pass-through of programming costs: an express limitation on the pass-throughs permitted for programming services affiliated with cable MSOs. Given the record that Congress established in examining the programming, sales and business practices of such affiliated cable services,[600] we are concerned about abuses that might occur if we permit vertically integrated cable operators to engage in unlimited pass-throughs of programming costs to their subscribers. Accordingly, pass-throughs of increases in programming costs attributable to the program services affiliated with such systems will be capped at the lesser of the annual incremental percentage increase in such costs or the GNP-PI.[601]

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[599] We will only permit the pass through of programming and other external costs that exceed inflation in order to prevent double recovery of costs. See para. 257, infra.

[600] See Implementation of Sections 12 and 19 of the Cable Television Consumer Protection and Competition and Diversity Act of 1992 - Development of Competition and Diversity in Video Programming Distribution and Carriage, Report and Order, FCC 93-178, released April 30, 1993

[601] We will apply our rules adopted in the program access proceeding to define affiliated programmers. See Implementation of Sections 12 and 19 of the Cable Television Consumer Protection and Competition and Diversity Act of 1992 - Development of Competition and Diversity in Video Programming Distribution and Carriage, Report and Order, FCC 93-178, released April 30, 1993; 47 C.F.R. Section 76.1000(b). Under those rules, an affiliated programmer is a programmer with an ownership interest of 5 percent or more including general partnership interests, direct ownership interests, and stock interests in a corporation where such stockholders are officers or directors or who directly or indirectly own 5 percent or more of the outstanding stock, whether voting or nonvoting. Such interests include limited partnership interests of 5 percent or greater.

253. We believe that treating programming costs as external costs outside the cap fulfills the statutory requirement that regulations governing the basic service tier take into account the direct costs (and changes in such costs) of obtaining, transmitting, and providing signals carried on the basic tier including additional video programming signals or services beyond the "must carry" local broadcast television signals.[602] Our accounting and cost allocation requirements will determine the share of programming costs to be allocated to basic service.[603] In general, to the extent they are not directly incurred at the franchise level, programming costs must be allocated from the system or company level to the franchise level on a per subscriber basis and then to the tier on which the programming is provided. The precise methodology for calculating external program costs and allocating them to the appropriate tiers will be set forth in FCC forms.[604]

254. Taxes, Franchise Fees, Costs of other Franchise Requirements. The Cable Act of 1992 requires that in setting basic service rates, we take into account the reasonably and properly allocable portion of: (1) taxes and fees imposed by any state or local authority on transactions between cable operators and subscribers; (2) assessments of general applicability imposed by a governmental entity applied against cable operators or cable

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[602] The Cable Act of 1992 requires that regulations governing rates for the basic service tier take into account cable operator revenues from advertising on the basic service tier or other consideration obtained in connection with the basic tier. Communications Act, § 623(b)(2)(C), 47 U.S.C. § 543(b)(2). We require that any revenues received from a programmer, or shared by the programmer and the operator, for carriage of signals be netted against costs for purposes of calculating whether there has been an increase or decrease in programming costs for the programmer. We believe that this most equitably balances the interests of cable operators in being compensated for increases in programming costs and of subscribers in paying fair rates. Thus, cable operators may recover increased costs of programming from subscribers but not to the extent they receive revenues from a programmer on account of carriage of programming. Our price cap requirements do not provide for adjustments to rates for the basic service tier on account of advertising revenues. However, system advertising revenues would be considered in any overall cost-of-service showing that a cable operator makes in order to justify rates above capped levels.

[603] See paras. 556-559, infra.

[604] Forms prescribing the precise methodology for calculating and allocating external costs and applying the price cap regime on a going-forward basis will be released shortly.

subscribers; (3) the cost of satisfying franchise requirements to support public, educational, or governmental channels or the use of such channels or any other services required under the franchise; and (4) the costs of any public, educational, and governmental access programming required by the franchising authority. We meet this statutory directive through the GNP-PI adjustment described earlier and by providing that certain costs unique to cable operations may be treated as costs external to the cap. In particular, we conclude that we should exclude from the cap taxes imposed on the provision of cable television service, franchise fees, and the costs of satisfying franchise requirements, including the costs of satisfying franchise requirements for local, public, educational, and governmental access channels. These costs are largely beyond the control of the cable operator, and should be passed on to subscribers without a cost-of-service showing. Our accounting and cost allocation rules adopted herein require that costs associated with PEG channels carried on the basic tier be directly assigned to the basic tier where possible; remaining costs of taxes and costs of satisfying franchise requirements will be allocated between or among tiers in proportion to the number of channels on each tier.[605] Because franchise fees may be assessed on a tier, subscriber or revenue sensitive basis, we require that franchise fees be allocated between tiers and subscribers in a manner reflective of the way they are assessed. The specific methodology to be used in calculating and allocating external costs will be prescribed in FCC forms.

(g)(3) Starting Date for External Treatment

255. We determine that for all categories of external costs other than franchise fees, the starting date for measuring changes in external costs for which the basic service per channel rate may be adjusted will be the date on which the basic service tier becomes subject to regulation or 180 days after the effective date of our regulations adopted in this Report and Order, whichever occurs first.[606] Any prior changes in costs will not receive external treatment.[607] Thus, for those systems

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[605] See paras. 556-559, infra.

[606] If the date on which the system becomes subject to regulation is after October 6, 1994, only increases in retransmission consent fees occurring after the date of regulation will be accorded external treatment.

[607] The initial date of regulation of the basic service tier is the date of local notice that the system is subject to regulation. The initial date of regulation of a cable programming services tier is the date on which a complaint is filed with the Commission concerning any cable programming services tier provided

for which the reasonable initial base per channel rate is determined by reference to September 30, 1992 rates, the resulting rate will be adjusted forward by inflation since September 30, 1992 (i.e. GNP-PI) until the date of regulation, or, 180 days from the effective date of our regulations, if the initial date of regulation occurs after 180 days from the effective date of regulation. We believe that this represents the best balance between practicality of administration and the operators recovery of external costs. Thus, it may be burdensome for cable operators to identify changes in external costs since September 30, 1992. On the other hand, permitting only inflation adjustments since September 30, 1992 until the effective date of regulation may unnecessarily encourage cost-of-service showings by cable operators who have experienced high levels of external costs in the interim.

256. We note, however, that the competitive benchmark levels derived from our benchmark formula and survey data will not include franchise fees. Thus, we will permit the total amount of franchise fees to be included in determining the lawful regulated per channel rate for the basic service tier as of the initial date of regulation.[608]

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by the system within the franchise area. We anticipate that the initial date of regulation will be different for the two tiers resulting in different initial permitted rates because of different adjustments for inflation and external costs. However, as a practical matter, we do not believe that the permitted rates for different tiers prior to going forward adjustments will differ significantly for most systems since we anticipate that the initial date of regulation for both tiers will be close in time. Thus, we do not believe that the potentially different periods for adjustments for inflation and/or external costs for different tiers depending on the initial date of regulation will cause significantly different rates for tiers such that our principle of tier neutrality will be violated. See also n. 501, supra.

[608] We conclude that at this time we should not give external treatment to costs of system improvements. Such expenditures are likely to be significant and if automatically passed through could lead to substantially increased rates. Additionally, system improvements typically increase channel capacity, which will increase the total revenues per subscriber achievable, even under the benchmark formula, or reduce maintenance or other service expenses. We believe that local authorities should be permitted to carefully weigh the costs and benefits of network improvements. Costs of network improvements could still be recovered through cost-of-service showings to the extent they cannot be recovered through rates regulated under the price cap scheme. We will monitor the effects of treating network improvement costs this way and, if it appears that this treatment is thwarting the development

DD. Limitation on External Treatment for Increases Less than Inflation

257. We recognize that the survey data on which our benchmark is based are not adjusted to exclude costs other than franchise fees. Thus, our measure of comparison to competitive rates includes most categories of external costs and the resulting permitted rates will also include these costs. This means that, when the inflation adjustment is applied to the permitted per channel rate on a going-forward basis, it will also permit recovery of increases in external costs to the extent they increase no more than inflation. Accordingly, to permit external treatment for the full amount of increases in these costs after the general adjustment for inflation would permit double recovery of such costs that are equal to or less than inflation. We conclude that, for all categories of external costs, we will permit external treatment for increases in such costs only to the extent they exceed inflation as measured by the GNP-PI. This requirement will not apply to franchise fees because the benchmark is based on data that excludes such fees and because our methodology for determining the permitted per channel rate excludes franchise fees. The annual inflation adjustment will also not apply to franchise fees. This will assure that there will not be a double recovery of franchise fees.[609]

(h) Cost-of-Service Showings

AA. The Opportunity to Justify Rates Above the Cap Based on Costs

i. Background

258. In the Notice, we proposed to establish an opportunity for cable operators to use cost showings to justify rates for the basic service tier above capped levels.

ii. Comments

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of new technologies and services, will review our decision as necessary.

[609] We additionally find that we should not permit increases for external costs up to the full extent of inflation if, in fact, they have not increased by the full amount of inflation. Thus, we also require that permitted per channel rates be adjusted downward from the rate that would result if based on a full inflation adjustment to the extent one or more external costs increase less than inflation. The practical result of this approach is that adjustments for external costs will equal the actual amount of decrease or increase in external costs.

259. Many cable operators and municipalities agree that cost-of-service principles should be implemented as a secondary mechanism to supplement the primary rate standard.[610] CATA and EET support the tentative conclusion reached in the Notice that secondary cost-of-service showings be available to cable operators that seek to justify rates above the basic service benchmark.[611] Municipalities, however, contend that secondary cost-of-service showings should be accessible either to all interested parties (e.g., cable operators, local franchising authorities, subscribers), or limited only to franchising authorities.[612] Dover and Municipal, for example, argue that if cable operators are allowed to justify rates above the benchmark, then franchising authorities and the Commission should also be permitted to use actual cost data to reduce rates below the benchmark in appropriate cases.[613]

260. Parties supporting the proposed secondary cost-of-service showing maintain that this regulatory approach cannot succeed without various uniform accounting and cost-of-service standards for the cable industry.[614] Municipal states that since cost-of-service regulation generally requires a substantial administrative expertise, effective Commission cost guidelines are necessary to permit local franchising authorities to effectively review rates. BellSouth finds that a reliable cost-of service methodology is also necessary since: the Act requires the FCC to use a cost-based type approach to determine installation rates for the basic service tier; and the Commission needs to protect against cable operator cross-subsidizing their entry into non-cable markets.[615]

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[610] See, e.g., Austin Comments at 48-49; CATA Comments at 21-22; Dover Comments at 15-16; EET Comments at 5; Municipal Comments at 15; Rapids Comments at 30-31; TIA Comments at 13.

[611] CATA Comments at 21-22; EET Comments at 5.

[612] See, e.g., Austin Comments at 49-49; Dover Comments at 15-16; Municipal Comments at 15; Rapids Comments at 30-31.

[613] Dover Comments at 15-16; Municipal Comments at 15. Austin states that cable operators should only be allowed to initiate a cost-of-service proceeding where it is constitutionally mandated, or where, at a minimum, the cable system submits actual cost data. Austin Comments at 48-49.

[614] See, e.g., BellSouth Comments at 16-18; Municipal Comments at 15; NewBern Comments 8-11; NYNEX Comments at 4; TIA Comments at 13.

[615] BellSouth Comments at 16-18.

261. NATOA opposes the use by cable operators of a secondary cost-of-service mechanism to justify rates above the primary rate.[616] NATOA argues that this approach would unfairly skew rate regulation in favor of the cable operator at the expense of the consumer.[617] NATOA and MCATC contend that cable operators might use secondary cost-of-service showings to seek higher unreasonable rates, since they are cognizant of the administrative disadvantages that this presents to local franchising authorities.[618] NATOA contends that a cable operator should not be permitted to exceed the benchmark for the basic service tier unless it can show that the benchmark is confiscatory in its individual circumstance.

iii. Discussion.

262. We have determined that our primary method of regulating cable service rates on a going-forward basis shall be a price cap mechanism applied to rates after they are initially set in relation to the competitive benchmark. This regulatory approach will ease administrative burdens because it will effectively regulate rates in most cases without the need for examining an individual system's costs. This choice reflects a reasonable balance of the statutory goals of minimizing administrative burdens and of protecting consumers. However, the starting price cap level is based on industry-wide data and does not necessarily reflect individual systems' costs of providing cable service. Thus, we can not be certain that the initial capped rate defined through benchmark comparisons will permit all cable operators to fully recover the costs of providing basic tier service and to continue to attract capital. We do not believe that Congress intended that cable operators could, or should, be compelled to provide basic service tier service at rates that do not recover such costs. Further, an overly tight cap on rates could hinder cable operators ability to make network improvements that could benefit subscribers. Accordingly, we believe that it is acceptable to permit cable operators to exceed the capped rate if they can make the necessary cost showings in certain circumstances.[619]

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[616] NATOA Comments at 44.

[617] Id.

[618] MCATC Comments at 9; NATOA Comments at 45-46.

[619] Of course, the fact that an operator has incurred a cost does not establish its right to recover that cost from subscribers. The extent to which costs can be recovered from subscribers will be governed by cost-of-service standards.

263. We reject the alternative of not permitting cable operators to exceed the cap unless that rate as applied to them is confiscatory. As we explain below, we believe that it will be preferable for the Commission to establish cost-of-service standards for the basic service tier. The Commission can then embody in those standards a balancing of the interests of consumers in paying a reasonable rate and of cable operators in earning a reasonable profit. A "confiscatory only" standard would, by contrast, constitute a substantially stricter standard that may ultimately disserve consumers by limiting cable operators' business incentives to provide service.

264. The Cable Act of 1992 requires that the Commission take into account in establishing regulations governing the basic service tier a "reasonable profit", as defined by the Commission, consistent with the Commission's obligations to ensure that rates are reasonable and the goal of protecting subscribers of any cable system not subject to effective competition from paying more for the basic service tier than subscribers would pay if the system were subject to effective competition.[620] In order to assure that our framework for regulation of rates of the basic service tier will take this statutory factor into account we establish that in any cost-of-service proceeding rates must be set to allow cable operators to earn a reasonable profit for provision of cable service. While we are not defining a reasonable profit for cable service generally at this time, and will be addressing that issue in the Second Further Notice and reviewing local franchising determinations concerning a reasonable profit on a case-by-case basis in the interim, a reasonable profit will be one that is fair to both cable operators and consumers. Thus, our regulatory framework for regulation of the basic service tier will satisfy the statutory requirement that we consider a reasonable profit consistent with statutory goals.

BB. Cost-of-Service Standards

i. Background.

265. In the Notice, we stated that cost-of-service regulation at any level requires determinations relating to four major cost components: rate base; cost of capital; depreciation; and operating expenses.[621] We stated that cost-of-service showings also require rules to govern the design of rates once determinations have been made in the four areas listed above. We proposed, in the Notice, to adopt requirements in each of these

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[620] Communications Act, § 623(b)(2)(C), 47 U.S.C. § 543(b)(2)(C).

[621] Notice, 8 FCC Rcd at 525, para. 61, Appendix B.

areas to govern cost-of-service showings by cable operators seeking to justify rates above the benchmark. We solicited comment on what requirements we would need to adopt in these areas and on the impact on the cable industry and subscribers of those requirements. We asked for comment on the specific issues raised in Appendix B to the Notice regarding rate base, cost-of-capital, depreciation, and operating expenses that would require resolution for cost-of-service standards to be adopted. The Notice additionally solicited comment on the optimal degree of cost averaging under cost-of-service regulation of cable service.[622]

ii. Comments.

266. NCTA urges the Commission not to adopt cost-of-service standards to govern secondary cost-of-service showings by cable operators.[623] It states that these issues can be resolved by local franchise authorities and the cable operator at the local level.[624] NATOA also urges the Commission not to adopt cost-of-service standards.[625]

267. Rate Base. Municipalities, cable operators, and New Jersey addressed the question of what should be included in the determination of the cable operator's rate base. Municipal and New Jersey state that the "used and useful" standard is the appropriate standard to use in measuring a cable operator's rate base.[626] Cable operators generally argue that acquisition costs represent bona fide business investments that should be included in the rate base.[627] On the other hand, municipalities support disallowance of goodwill since they contend that it is not cost-based and, if allowed, would permit operators to recover their own expectations of monopoly profits from subscribers.[628] NAB

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[622] Notice, 8 FCC Rcd at 524-25, para. 60.

[623] NCTA Comments at 39.

[624] NCTA Comments at 40-41.

[625] NATOA Comments at 46.

[626] Municipal Comments at 16-17; New Jersey Comments at 11-13.

[627] See, e.g., ACI Reply Comments at 2; Media General Comments at 15; Prime Comments at 6-9. Prime maintains that goodwill must be included in rate base to avoid the Fifth Amendment's prohibition on confiscatory rates.

[628] See, e.g., Municipal Comments at 16; NewBern Comments at 19; New Jersey Comments at 12; Thousand Oaks Comments at 20; Rapids Comments at 31.

submitted a proposed regulatory framework for the basic service tier that would prevent recovery from subscribers of costs in excess of system replacement costs.[629] Thousand Oaks claims that since converter boxes are for the benefit of pay-per-view customers, this equipment should be excluded from rate base.[630] Rapids and New Jersey recommend that equipment be included in rate base rather than expensed, to be consistent with traditional cost-of-service regulation.[631]

268. Cost of Capital. Media General argues that the cable industry's rate of return should exceed that of the telephone industry. Media General states that competition from DBS, cellular television, broadcast television, and video dialtone demonstrates that the long term risk in the cable industry is higher than for telephone companies.[632] Rapids contends that the risk of investing in cable stock is no greater than investing in the Standard & Poors 400 companies, and that the risk might even be lower due to the lack of competition.[633]

269. Depreciation, Operating Expenses, Rate Design. Few commenters specifically commented on depreciation, operating expenses, or rate design. McKinney and NewBern want industry-wide uniformity in determining the expected service life of cable plant in order to facilitate judgement of reasonableness of basic tier rates.[634] McKinney and NewBern would include retransmission consent fees as operating expenses.[635]

iii. Discussion.

270. We conclude that cost-of-service standards should be adopted to govern the extent to which cable operators may exceed capped rates for the basic service tier based on costs. Such standards are necessary to define the costs and level of profits that will justify a rate increase and to permit a reasoned decision whether the proposed rate increase should be allowed. Moreover, we believe that it is preferable, at least in

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[629] NAB Comments at 16-18.

[630] Thousand Oaks Comments at 21.

[631] New Jersey Comments at 12; Rapids Comments at 32.

[632] Media General Comments at 61; see also NCTA Reply Comments a: 24.

[633] Rapids Comments at 32.

[634] McKinney Comments at 19; NewBern Comments at 18.

[635] McKinney Comments at 20; NewBern Comments at 19-21.

the initial stages of rate regulation of cable service, for the Commission to establish uniform cost-of-service standards. Uniform standards governing cost-of-service showings by cable operators for basic service provided in different communities, and between basic service and cable programming services, are more likely to promote the statutory goal of reducing administrative burdens than would a multiplicity of cost-of-service standards applicable to an individual operator and to the industry as a whole. Allowing local authorities to determine cost-of-service standards would also foreclose significant opportunities for efficiencies in administration of rate regulation because it could foreclose the possibility of applying cost-of-service standards on a higher operating level than the franchise level. Moreover, because cost-of-service standards embody a fundamental balancing of the interests of consumers in paying a fair rate and of cable operators in recovering their costs and earning a reasonable profit, how this balance is struck could have a far reaching impact on the industry and cable subscribers.[636] While it may be appropriate in the future for local franchising authorities to assume a larger role in setting cost-of-service standards for the basic tier as rate regulation develops, we believe that these standards should for now be established at the national level. The Cable Act of 1992 also envisions that the Commission, not local authorities, will establish standards and procedures for rate regulation of the basic service tier. Accordingly, we determine that the Commission will establish cost-of-service standards for the basic service tier.

271. In the Notice we proposed to adopt cost-of-service standards and solicited comment on the potential impact on subscribers and operators of the particular standards that we might adopt. The Commission will carefully balance competing interests and fashion standards that are fair to consumers and operators. By not unreasonably restricting a cable operator's ability to earn a reasonable profit, such standards can also assure the continued growth and success of the cable industry and

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[636] See, e.g., Jersey Central Power & Light v. FERC, 810 F.2d 1168, 1177 (D.C. Cir. 1987); Farmers Union Central Exchange, Inc. v. FERC, 734 F.2d 1486, 1502 (D.C. Cir. 1984); Mobil Oil Corp. v. FPC, 417 U.S. 283, 308-309 (1974); In Re Permian Basin Area Rate Cases, 390 U.S. 747, 792 (1968) (finding that the regulatory authority had a responsibility to consider not only the interests of producers in earning a fair return, but also "the relevant public interests, both existing and foreseeable); FPC v. Hope Natural Gas Co., 320 U.S. 591, 602 (1944) ("It is not theory but the impact of the rate order which counts."); id. at 603 ("the fixing of 'just and reasonable' rates involves a balancing of the investor and the consumer interests."); and Bluefield Waterworks v. PSC, 262 U.S. 679 (1923).

the continuation of related benefits that it can bring to the public. We find, however, that the record concerning cost-of-service for cable service generally is not sufficient to permit the crafting of detailed cost-of-service standards for cable service required to achieve these objectives.[637] For example, we are unable to gauge at this time the extent to which general disallowances of debt incurred to purchase cable systems in excess of replacement cost would affect the industry and consumers. Similarly, we do not have information on the impact of particular depreciation and amortization schedules for different categories of equipment. Nor do we have adequate information on the optimum level of cost averaging. We also do not have significant information on the cost of providing cable service. Accordingly, we will not adopt specific cost-of-service standards at this time. Instead, we will issue a Second Further Notice of Proposed Rulemaking in the near future looking toward adoption of cost-of-service standards.

272. Pending this rulemaking, which we intend to complete on an expedited basis, cable operators may elect either to maintain rates currently in effect and attempt to justify them through a cost showing in their initial rate filings, or to reduce these rates to the level we have discussed above. Cable operators that reduce rates in accordance with our requirements may subsequently seek to raise rates above the cap pursuant to the general procedures we are establishing.[638] Pursuant to those procedures, local authorities (or the FCC in situations where we regulate basic rates) will review cost-of-service showings by cable operators seeking to raise rates above capped levels, when

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[637] As discussed at n. 715, infra, we identify a permitted rate of return for installation and provision of equipment by cable operators. The Cable Act of 1992 requires that charges for equipment be based on actual cost. Cable operators must comply with our actual cost requirements as of the initial date of regulation, whereas cost-of-service standards for cable service generally will be the secondary method of regulation of cable service rates and will only be applied if cable operators elect to make cost-of-service standards. In addition, specifying a reasonable profit level for cable service generally may have a greater industry impact than would specifying profit levels only for provision of installation and equipment. Accordingly, we identify a reasonable profit level for equipment at this time while proceeding on a case-by-case basis for cost-of-service showings for cable service generally pending our rulemaking that will address cost-of-service standards.

[638] See Section II.A.3.b supra.

cable operators choose to make such showings.[639] When a cable operator elects to make a cost-of-service showing we will permit local authorities to prescribe any rate that is justified by the cost showing, including a rate lower than the benchmark or the operator's current rate level. Thus, when electing a cost-of-service showing, the cable operator assumes the risk that its rate could be lowered if such action is justified by the cost showing. Cable operators or subscribers may then appeal the local decision to the Commission. We will review such local decisions on a case-by-case basis pending our cost-of-service rule making.[640]

(3) Regulations Governing Rates for Equipment

273. This section establishes regulations to comply with Section 623(b)(3) of the Cable Act of 1992, which directs the Commission to establish standards for setting, on the basis of actual cost, the rates for installation and lease of equipment used by subscribers to receive the basic service tier, and installation and lease of monthly connections for additional television receivers. The Commission concludes that the equipment covered by this section of the Act includes the converter box,[641] remote control unit, connections for additional television receivers and cable home wiring. We further conclude that Congress intended these actual cost regulations to cover all installations and equipment used by subscribers to receive the basic service tier in systems not subject to effective competition, even if the installation or equipment is also used for other cable services. While we decline to establish our own separate test of effective competition for equipment, we conclude that Congress intended our regulations to encourage competition in the provision of equipment and installation services. Therefore, our regulations require an unbundling of the charges for all regulated equipment and installations, as described below.

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[639] A local authority may not, of course, use our subsequently adopted cost-of-service rules to justify a refund for rates charged prior to the rules' effective date, but would have to rely on the general cost-of-service regulatory principles it chooses to use prior to the effective date of those rules.

[640] Local authorities may require cable operators to reduce rates based on their cost-of-service determinations. We will consider petitions for stay of the local decision pending any appeal of the local decision by the operator to the Commission.

[641] Converter boxes include those boxes that act as an extended tuner for subscribers who do not have a cable-ready television, those boxes that descramble a signal, and addressable boxes.

274. The Commission has determined that Congress intended that cable operators can recover the costs of leasing equipment and service installation by charging directly for those activities. Because the Act requires the Commission to establish standards for setting rates for lease of equipment and installation, we will require the local franchising authorities to follow the detailed guidelines we now adopt for identifying the costs to be recovered through equipment and installation rates and for calculating those rates. We believe that our guidelines satisfy the statutory requirements, and thus a local franchising authority's proper use of them to determine reasonable rate levels cannot form the basis of a cable operator complaint to the Commission. Under our guidelines, cable operators shall establish an Equipment Basket to which they will assign the direct costs of service installation, additional outlets, leasing and repairing equipment. The basket will include an allocation of all those system joint and common costs that installation, leasing and repairing equipment share with other system activities, excluding general system overhead. The Equipment Basket includes a reasonable profit. The Commission will not prohibit the use of promotional offerings, but operators must exclude the costs of promotions from the Equipment Basket.

(a) Equipment Covered

i. Background

275. The Cable Act of 1992 directs the Commission to establish standards for setting, on the basis of actual cost, the rate for lease of equipment used by subscribers to receive the basic service tier, including converter boxes and remote control units, and lease of monthly connections for additional television receivers.[642] The Notice tentatively concluded that equipment covered by this section of the Act includes the converter box, remote control unit, connections for additional television receivers, and wiring that includes other inside cabling.[643] The Notice, however, sought comment on the extent of this coverage. The Notice expressed a need to clarify the relationship between Section 623(b)(3), which requires regulating, on the basis of actual cost, "equipment used for the basic tier," and Section 623(c), requiring regulations for cable programming services, which include installation or rental of equipment used for the receipt of such programming services. For the latter, the Commission must establish standards for determining whether the rates are unreasonable. Cost is to be only one of several

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[642] Communications Act § 623(b)(3), 47 U.S.C. § 543(b)(3).

[643] Notice, 8 FCC Rcd at 525.

factors considered in determining these standards for cable programming services.[644]

276. The Notice pointed out the tension between Section 623(b)(3)(A), which specifically lists an addressable converter box needed to access video programming on a per channel or per program basis, among the equipment subject to the actual cost standard,[645] and the inclusion of equipment and installation in the definition of cable programming services.[646] The Commission surmised that Congress intended for some equipment to be regulated on the basis of actual cost and other equipment to be regulated under the standards for cable programming services, but expressed uncertainty over how to treat equipment that is used for the provision of both basic tier service and cable programming services. Therefore, we requested comment on the existence of any equipment not used for basic tier service and the extent to which the actual cost standard of Section 623(b)(3) controls the rates charged for equipment used for more than just basic tier service.[647]

ii. Comments

277. Commenters generally do not disagree with the Notice's tentative conclusion on rate regulation for the types of equipment used to receive cable service.[648] As an initial matter, a few local franchising authorities request clarification

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[644] Notice, 8 FCC Rcd at 525.

[645] In addition, the legislative history indicates a change in wording from "equipment necessary for subscribers to receive the basic service tier" in the original House bill, to "equipment used by subscribers to receive the basic tier" in the Act. The Conference Report says that this language is meant to give the Commission greater authority to protect the interests of the consumer. Conference Report at 64.

[646] In fact, the definition of cable programming service was amended in conference to include installation and lease of equipment. See Conference Report at 66.

[647] Notice, 8 FCC Rcd at 525-26.

[648] See Armstrong Comments at 21-22; InterMedia Comments at 22; Rapids Comments at 34. It appears, however, that CIC and Cox did not include cable home wiring as equipment, and would include the drop from the pole to the home as part of customer equipment. CIC Comments at 38; Cox Comments at 33-34; CSC Comments at 12-13.

that they have jurisdiction to regulate equipment rates.[649] The main area of discussion concerning the types of equipment covered by the Act involves the question of whether certain equipment should not be regulated because of its wide commercial availability.[650] Many cable operators argue that some equipment, particularly remote control devices, is commercially available and the marketplace should regulate the price of this equipment.[651] Several cable operators urge the Commission to adopt a test of effective competition specifically for equipment.[652] They would avoid regulation of a piece of equipment by certifying that a particular piece of equipment is available for sale or lease from third party sources and that they have advised subscribers of that fact.[653]

278. NATOA disagrees with cable operators who suggest that equipment of a regulated system should not be subject to rate regulation if there exist third-party sources for such equipment in a franchise area. NATOA argues that Congress did not intend for cable service to be interpreted narrowly to exclude equipment, installation and additional outlets. According to NATOA, the definition of cable programming service, which includes equipment and installation, demonstrates a broader statutory definition of cable service. If equipment and installation are subsumed in the term cable service, they are covered by the effective competition standard. Thus, equipment

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[649] NJ Comments at 24; Rapids Comments at 33-34; SD Comments at 3.

[650] In addition, CSC asserts that additional outlets should not be regulated because they are discretionary services and not required to meet the statutory goal of an affordable entry level package of service and equipment. CSC Comments at 6. For a further discussion of regulation of additional outlets, see paras. 306-307, infra. Also, NATOA expresses concern that operators would begin charging for equipment that previously did not have a charge, particularly equipment that would be considered network rather than customer premises equipment. NATOA Comments at 50.

[651] CIC Comments at 38; Continental Comments at 40; CSC Comments at 4; see also Encore Comments at 15. Continental argues that non-addressable converters also have wide commercial availability. Continental Comments at 40.

[652] AdelphiaII Comments at 72; Nashoba Comments at 71; TimeWarner Comments at 56.

[653] AdelphiaII Comments at 73; Falcon Comments at 41; Nashoba Comments at 72; TimeWarner Comments at 57; see also CSC Comments at 13-14.

prices are subject to rate regulation as long as a system is not subject to effective competition.[654]

279. There was much disagreement over how to treat equipment used to receive both basic tier service and other cable services. State and local governments generally urge a more inclusive interpretation of the term "equipment used by subscribers to receive the basic service tier."[655] Some contend that the actual cost standard of Section 623(b)(3) applies to any equipment used to receive the basic tier, even if it is also used to receive other cable services.[656] Others assert that all equipment and installation should be subject to the actual cost standard.[657] Cable operators argue that regulation on the basis of actual cost applies to equipment and installation only used for the basic tier.[658] Several operators also include as subject to actual cost regulation, addressable converters used by basic only subscribers to receive pay per channel or pay per view programming, as specified in Section 623(b)(3)(B).[659]

280. According to some operators, Congress altered the language of Section 623(b)(3) from "necessary" to "used" to receive basic tier service because Congress intended to include among equipment regulated under the actual cost standard remote

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[654] NATOA Reply Comments at 29-31.

[655] However, a few local authorities expressed concern that basic subscribers should only be charged for equipment actually necessary to provide basic service. Austin Comments at 55-56; MACC Comments at 4.

[656] MCATC Comments at 14-15; Minn Comments at 15; NATOA Comments at 48; Schaumburg Comments at 9.

[657] Conn Comments at 12; NewBedford Comments at 5-6; NJ Comments at 23; Somerville Comments at 5-6.

[658] AdelphiaII Comments at 64; Armstrong Comments at 21-22; Comcast Comments at 43; Continental Comments at 39; CSC Comments at 10; InterMedia Comments at 22; Nashoba Comments at 63; NCTA Comments at 48-49; Newhouse Comments at 17-18; Simmons Comments at 1; TCI Comments at 31; TimeWarner Comments at 49; but see Carib Comments at 11 (Carib uses addressable converters for receipt of all cable services and argues that Commission should apply only one standard to equipment because different standards "will confuse both operators and subscribers without any discernable benefit.")

[659] AdelphiaII Comments at 64-65; Falcon Comments at 37; Nashoba Comments at 63-64; NCTA Comments at 51; Newhouse Comments at 18; TCI Comments at 35-36; TimeWarner Comments at 49-50.

control devices, which are not necessary to receive basic tier service.[660] Others argue this language change was meant to mirror the equipment language in the cable programming services definition and to give the Commission greater authority to protect the interests of the consumer.[661] Several cable operators contend that applying an actual cost standard broadly will inhibit research and development in new equipment technologies.[662]

281. Operators suggest two tests for whether equipment is used for the basic tier. Some contend that the test should be the service level of the subscriber using the particular equipment. A basic subscriber pays for equipment based on an actual cost standard, and a subscriber to cable programming services is charged for equipment based on an unreasonable standard, even if the equipment is identical.[663] Others argue that capacity of equipment is the key.[664] Thus, if an addressable converter is required to access basic, its price would be regulated under basic. If basic were unscrambled, but a subscriber needs an addressable converter for satellite tier programming, the price of a converter would be regulated as a cable programming service. Rates for converters required only to access premium services would not be regulated under this approach.[665]

iii. Discussion

282. We adopt our tentative conclusion concerning the type of leased equipment covered by the rate provisions of the

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[660] CSC Comments at 10 and n. 17; NCTA Comments at 49.

[661] AdelphiaII Comments at 66-67; Nashoba Comments at 65-66; Newhouse Comments at 19-20; TimeWarner Comments at 50-51.

[662] Comcast Comments at 47; Continental Comments at 39-40; CSC Comments at 11-12; TCI Comments at 37-38.

[663] AdelphiaII Comments at 68-69; Cole Comments at 30-31; Falcon Comments at 38-39; Nashoba Comment at 67-68; Newhouse Comments at 20-21; TCI Comments at 31-32; TimeWarner Comments at 55; see also CSC Comments at 10 (equipment subject to this provision of the Act should be limited to converter and remote made available to a basic customer for use in connection with a primary outlet).

[664] Armstrong Comments at 21-22 (functionally required); Blade Comments at 10 (operationally necessary); Continental Comments at 39-40; InterMedia Comments at 22; Simmons Comments at 1.

[665] Continental Comments at 39.

1992 Cable Act, i.e., converter box, remote control unit, connections for additional television receivers, and wiring that includes other inside cabling.[666] Commenters did not list additional equipment that we had overlooked. We also agree with NATOA that the Commission must establish guidelines for determining the actual cost of equipment used to receive the basic tier for all cable systems not subject to effective competition. Although we believe that Congress intended our regulations to encourage a competitive market in the provision of equipment and service installation, we do not have the information we would need to establish an effective competition test for equipment and installation at this time. We conclude that Congress, by specifically listing converter boxes and remotes in Section 623(b), expressed its opinion that these items were not subject to effective competition apart from a determination that the whole cable system is subject to effective competition.[667] Furthermore, Congress determined that developing a competitive market for equipment required additional study by this Commission.[668] We have begun a proceeding to investigate these issues and do not wish to prejudge that proceeding by making determinations here without sufficient data.[669]

283. We further believe that Congress intended the actual cost standard to apply broadly to all equipment used to receive basic tier service. The legislative history indicates that the statutory language was changed to give the Commission greater authority to protect the interests of the consumer.[670]

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[666] We adopt the same demarcation point for cable home wiring that we adopted in our proceeding on that subject. For single unit installations, that point is twelve inches outside of where the cable wire enters the outside wall of the subscriber's premises. For multi-dwelling units, the demarcation point is twelve inches outside of where the cable enters the outside wall of the subscriber's individual dwelling unit. See Report and Order in MM Docket 92-260, Implementation of the Cable Television Consumer Protection and Competition Act of 1992, Cable Home Wiring, FCC 93-73 (released Feb. 2, 1993), recon. pending.

[667] Section 623(b) of the Communications Act is designed to protect subscribers of cable systems not subject to effective competition. Communications Act, § 623(b), 47 U.S.C. § 543(b).

[668] See Communications Act § 624A, 47 U.S.C. 544A.

[669] See Notice of Inquiry in ET Docket No. 93-7, (Implementation of Section 17 of the Cable Television Consumer Protection and Competition Act of 1992, Compatibility Between Cable Systems and Consumer Electronics Equipment), 8 FCC Rcd (1993).

[670] See Conference Report at 64.

We find that this change in terminology was significant and was specifically intended to broaden the class of equipment subject to regulation on an actual cost basis. We interpret Congress' intent, therefore, to mean that we are obligated to give the term "used to receive basic tier service" an expansive reading as NATOA urges, rather than the narrow reading advocated by cable operators. Moreover, as the Notice discussed, the statute specifically included addressable converter boxes needed to access video programming on a per program or per channel basis. The inclusion of such equipment additionally reflects Congress' desire that we broadly interpret the phrase "equipment used to receive the basic service tier." We also agree with commenters who contend that regulating identical equipment differently depending on the level of service received by the subscriber will lead to customer confusion.[671] Congress expressed concern about the rates for equipment, particularly remote control devices.[672] If we narrowly define equipment used to receive basic tier service, operators might seek to evade regulation of remotes, for instance, by providing to basic subscribers converter boxes that do not have remote control capabilities.[673] Our broad interpretation of equipment used to receive basic tier service does not require a meaningless interpretation to the definition of cable programming services which includes equipment and installation. We believe that Congress included equipment and installation in the definition of cable programming services to prevent cable operators from avoiding regulation of equipment, if any, used to provide cable programming services alone or in conjunction with unregulated services.

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[671] We recognize that the technology for cable equipment is rapidly changing and Congress did not intend to inhibit innovation. Therefore, we note that in the future, cable operators may wish to provide converter boxes or remotes capable of numerous functions and that are used to receive the basic service tier. Initially, these devices might have very high costs. An operator would be entitled to recover actual costs, as we define them below, through monthly charges for the lease of this equipment. Alternatively, our rules will not preclude the operator from pricing these devices below-cost to encourage their use. The operator could recover the remainder of its costs in whole or in part through increased charges for unregulated services, per channel and pay-per view, that these devices also provide. See paras. 301-302, infra for a discussion of below-cost pricing.

[672] See, e.g., Communications Act, § 624A(c)(2)(D), 47 U.S.C. §544A(c)(2)(D); House Report at 27-28, 83-84, 108.

[673] See Simmons Comments at 1 (claiming that if a remote is not offered to basic subscribers, then remotes would not be subject to the actual cost standard).

(b) Unbundling

i. Background

284. The Notice tentatively concluded that Congress intended to separate rates for equipment and installations from other basic tier rates. The Notice relied on the fact that the statute addresses rates for equipment used to receive basic tier service and related installation in a subsection separate from those dealing with cable service rates. In addition, the statute establishes for basic tier equipment and installation a standard based on actual costs, which are only one of several factors used to evaluate the reasonableness of other basic tier rates. The Notice also requested comments on the feasibility of a competitive market developing for installation services in light of the potential for an increase in theft of service related to third party installations.[674]

ii. Comments

285. In general, cable operators argue that the Commission should not require operators to unbundle equipment and installation rates from other basic tier rates.[675] Other parties agree with the Commission's tentative conclusion to separate rates for equipment and installation from other basic tier rates.[676] For example, many municipalities claim that unbundling will not only impact rates for subscribers, but should assist in meeting the Congressional goal of promoting competition in subscriber technology.[677] Several operators counter that no evidence exists that a competitive environment for equipment and installation would be hindered by permitting operators to bundle

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[674] Notice, 8 FCC Rcd at 525 and n. 90.

[675] Armstrong Comments at 23; Carib Comments at 10-11; Continental Comments at 36; InterMedia Comments at 24; NCTA Comments at 46.

[676] Austin Comments at 55; Baltimore Comments at 9; BellAtlantic Comments at 11; CFA Comments at 132; Conn Comments at 11; Dade Comments at 10; Dover Comments at 19; EIA Comments at 4; Minn Comments at 14; Multiplex Comments at 12; NATOA Comments at 46; NYNEX Comments at 11; Rapids Comments at 34; SquareD Comments at 4; Bayonne Reply Comments at 9; GTE Reply Comments at 17; NYNEX Reply Comments at 13; USTA Reply Comments at 5; Watertown Reply Comments at 10.

[677] Laurinburg Reply Comments at 4; Laurens Reply Comments at 4; Owensboro Reply Comments at 4; Piscataway Reply Comments at 4; Reidsville Reply Comments at 4; Titusville Reply Comments at 4; Union Reply Comments at 4; Worthington Reply Comments at 4.

equipment and installation rates.[678] If bundling were prohibited, cable operators claim, they would face an unnecessary intrusion into their business practices.[679]

286. Several operators contend that even if the Commission prohibits bundling of basic service and equipment, it should allow operators to establish rates for equipment, installation, service calls and additional outlets, as long as rates remain within a reasonable rate pool or basket.[680] Many commenters believe that the Commission should not allow cable operators to bundle rates for installation with rates for lease of equipment.[681] Several parties agree with the Commission that unbundling may promote competition in the provision of equipment and installation.[682] Commenters did not express a great deal of concern about potential theft of service or signal leakage problems associated with third party installations.[683] Some commenters further argue that not only should rates for equipment and installation be unbundled, but charges for each individual item and activity should be unbundled.[684] CFA claims that this does not mean, however, that a cable operator may not offer a

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[678] AdelphiaII Comments at 81-82; Falcon Comments at 47; Nashoba Comments at 80-81; Newhouse Comments at 29-30; TimeWarner Comments at 64.

[679] AdelphiaII Comments at 82; Nashoba Comments at 81; Newhouse Comments at 30; TimeWarner Comments at 64-65.

[680] AdelphiaII Comments 82-83; Falcon Comments at 47-48; Nashoba Comments at 81-82; TimeWarner Comments at 65.

[681] Austin Comments at 55; Minn Comments at 14; NATOA Comments at 46; Schaumburg Comments at 9; SDA Comments at 11; Bayonne Reply Comments at 9; Watertown Reply Comments at 9.

[682] NATOA Comments at 47; Rapids Comments at 34; Schaumburg Comments at 9; Bayonne Reply Comments at 9.

[683] See, e.g., Armstrong Comments at 24 (most signal leakage occurs at the tap and the drop); EIA Comments at 8 (competition need not entail unacceptable risks of signal piracy); Multiplex Comments at 14-15 (Commission's concern that subscriber home wiring ownership might increase the risk of signal leakage is unfounded because virtually all subscriber owned equipment containing active components is governed by Commission technical standards controlling interference potential); SquareD Comments at 9 (cable industry has managed to deal successfully with theft of service in a competitive market place for the past several years).

[684] Conn Comments at 11-12; CFA Reply Comments at 14-15; see also Austin Comments at 55.

package of equipment at a single price in addition to offering each piece of equipment separately.[685]

iii. Discussion

287. We conclude that unbundling rates for equipment, installation, and additional outlets from the rates for basic service best comports with our Congressional mandate. As explained in the Notice, Congress discussed rates for equipment used to receive basic tier service and related installation in a subsection separate from those dealing with cable service rates. In addition, the statute requires an actual cost standard for basic tier equipment and installation, but includes several other factors for evaluating basic tier service rates. Accordingly, in order to apply the separate equipment and programming service standards, the rates for each must be unbundled from each other. Our decision to define the term "equipment used by subscribers to receive basic tier service" broadly also requires, at minimum, an unbundling from other cable system costs of costs related to specific types of equipment and installations. Once an operator identifies the costs associated with equipment and installation, developing cost-based charges should not burden the operator.

288. The Commission agrees with commenters who argue that we should require complete unbundling of the charges for equipment and installation. Therefore, we will require separate charges for each significantly different type of remote, converter box and installation. An operator may establish one charge for all other customer equipment or develop individual charges for specified other equipment. We believe that separate charges for individual pieces of equipment will help franchising authorities and subscribers to evaluate whether charges are set on the basis of actual costs. In addition, we think that this total unbundling is consistent with the development of a competitive market for equipment and installation.[686] We conclude that Congress intended that our rules implementing the Cable Act encourage competition.

(c) Actual Cost Standard

i. Background

289. The Cable Act directs the Commission to establish standards for setting, on the basis of actual cost, the rate for installation and lease of equipment used by subscribers to

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[685] CFA Reply Comments at 14.

[686] As noted above, commenters did not express concern over potential theft of service or signal leakage problems related to independent installations.

receive the basic service tier. The Notice proposed requiring operators to base charges for equipment covered by Section 623(b)(3) on direct costs, and indirect cost allocations, including reasonable general administrative loadings and a reasonable profit.[687] The Notice also proposed determining the actual costs for installation on the same basis as equipment. We recognized, however, that this determination would involve allocating many joint and common costs, and instead of proposing allocation rules, the Commission suggested requiring the cable operator to bear the burden of showing the reasonableness of its implementation of our general allocation rules.[688] The Notice concluded that it appears reasonable for our rules to permit cable systems to recover installation costs as a one-time charge.[689] The Commission recognized that costs for installation will vary depending on whether the dwelling has inside cabling already.[690] Therefore, we requested comment on whether costs vary enough to reasonably require cable operators to develop two separate rates for installation or to use an average rate and whether that decision should be left to the discretion of the local franchising authority. In addition, we requested comment on whether there should be provision for a surcharge when the distance between a customer's premises and the operator's distribution plant is substantial.[691]

290. As an alternative to leasing equipment, the Notice recognized that cable operators may wish to sell equipment to their customers.[692] We proposed limiting operators in these

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[687] Notice, 8 FCC Rcd at 526.

[688] Notice, 8 FCC Rcd at 526.

[689] Notice, 8 FCC Rcd at 526. The Notice based this conclusion on the extent to which installation costs have traditionally been recovered through a one-time charge and because the length of time a subscriber will continue service is unpredictable. We specifically noted, however, that we did not intend to require recovery of installation costs as one-time charges. Id. at 526 and n. 100.

[690] Whether the cable system is well-established in the community might be an important factor because dwellings in such areas are more likely to have been previously wired.

[691] Notice, 8 FCC Rcd at 526-27

[692] Although the statute refers to the lease of equipment, this alternative assumes that Congress's main concern was preventing customers from paying for equipment many times over through monthly rental fees. See House Report at 83-84. The sale may occur as a one-time payment or over a period of time. Notice, 8 FCC Rcd at

circumstances to the recovery of actual costs, however we define that term. We observed that actual costs may vary depending on the length of payment schedule. Where the operator sold equipment to subscribers, the purchaser would have responsibility for repair of the equipment, unless a service contract were also purchased. The Notice also took note of the potential competitive advantage cable operators would enjoy during the development of an alternative market for cable equipment. Therefore, we proposed that customers, purchasing on time from the cable operator, would be permitted to change their mind and purchase equipment from an alternative source. Under those circumstances, the cable operator must discontinue the equipment charge, but the equipment could be sold or leased to another customer as used equipment at a rate reflecting recovered costs.[693]

ii. Comments

291. We received various suggestions for determining the actual costs of equipment and installation. For example, some operators contend that rates must account for the following: installation; amortization; maintenance; financing; general administrative overhead; and a reasonable profit.[694] Other commenters would limit an operator's charges for equipment and installation.[695] In addition, some commenters describe limitations in operators' current accounting records.[696] Several parties suggest we establish a national average cost for each type of equipment.[697] CSC suggests we adopt a benchmark applicable to all basic equipment that would allow operators to

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[693] Notice, 8 FCC Rcd at 526.

[694] See AdelphiaII Comments at 74-75; Falcon Comments at 42; Nashoba Comments at 73-74; Newhouse Comments at 23-24; TimeWarner Comments at 58. See also Armstrong Comments at 21; CIC Comments at 38-39; Cox Comments at 33-34; InterMedia Comments at 21-22, for similar lists.

[695] Baltimore Comments at 9 (charges should be no more than cost); CFA Comments at 132 (because Congress intended to promote a competitive cable equipment market, it makes no sense to allocate joint and common costs to equipment); Miami Beach Comments at 11 (actual cost does not include reasonable profit); Rapids Comments at 35 (charge should recover direct costs plus a nominal contribution to overhead).

[696] See Comcast Comments at 51-52; Multiplex Comments at 11.

[697] See, e.g., CIC Comments at 38-39; Cox Comments at 33-34.

retain their current equipment price structure.[698] TCI suggests competitive price benchmarks which can be presumed at cost.[699] NATOA contends the Commission should establish a benchmark rate or rates for installation because installation costs are not as readily identifiable as equipment costs.[700] Some operators propose applying a presumption that an installation rate is reasonable if it is no greater than the hourly rate charged for similar installations by the local exchange telephone carrier (LEC) that provides service in the area.[701] MCATC, however, recommends against a benchmark methodology, because a cost analysis of equipment and installation charges incorporates more discrete data, which would lend itself to manageable cost of service analysis.[702]

292. Commenters support the Commission's proposal to allow for recovery of installation costs as a one-time charge.[703] Cable operators generally prefer to average installation costs rather than establish separate rates for complete installations and previously wired homes.[704] Other parties, however, believe that installation rates should more closely reflect the cost of the actual installation.[705] On the other hand, operators support the application of a surcharge when the distance between a

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[698] CSC Comments at 12-13 n. 19.

[699] TCI Comments at 38-39; see also Multiplex Comments at 11 (if Commission does not adopt an allocation methodology, it should adopt a regional benchmark).

[700] NATOA Comments at 47.

[701] Falcon Comments at 44; Newhouse Comments at 26; TimeWarner Comments at 60-61.

[702] MCATC Comments at 11.

[703] See Armstrong Comments at 24; InterMedia Comments at 25; CATA Comments at 34; Continental Comments at 37 and Appendix D; Lenfest Comments at 7; NATOA Comments at 48.

[704] Carib Comments at 11-12; Continental Comments at 38 n.14; Lenfest Comments at 7.

[705] See Austin Comments at 56 (arguing that installation costs should be presumed nominal if the home already has cable home wiring); GTE Comments at 13 (Commission should unbundle installation into installation of service and installation of premises wiring); NMCC Comments at 4 (installation rates should reflect the amount of service that the customer actually needs).

customer's premises and operator's distribution plant is substantial.[706]

293. In general, commenters support the Commission's proposal to allow operators to sell equipment.[707] A few municipalities mention that the cable operator in their jurisdiction refuses to sell equipment.[708] Some commenters contend that the Commission should not allow third party vendors to supply addressable converters because of security and theft of service concerns.[709] In addition, cable operators disagree with the Commission's proposal to allow subscribers to cancel purchase agreements if the customer wishes to purchase the equipment from an alternative source.[710] Finally, several parties suggest that the Commission require cable operators to inform subscribers that alternative sources for equipment exist.[711]

iii. Discussion

294. We believe that, by requiring that charges for equipment and installation be based on actual cost, Congress intended that cable operators can recover the costs of leasing equipment and service installations from charges for those activities. Because the Act requires the Commission to establish standards for setting rates for lease of equipment and installation, we will require the local franchising authorities to follow the detailed guidelines we now adopt for identifying

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[706] See AdelphiaII Comments at 78-79; CATA Comments at 36-37; Falcon Comments at 45; Lenfest Comments at 7; Nashoba Comments at 77-78; Newhouse Comments at 27; TimeWarner Comments at 62.

[707] Austin Comments at 56; Continental Comments at 37; Lenfest Comments at 7; NMCC Comments at 5; ThousandOaks Comments at 22.

[708] Baltimore Comments at 3; Somerville Comments at 5.

[709] Armstrong Comments at 22; InterMedia Comments at 23; see also MediaGeneral Comments at 10-11 (Commission should not allow subscribers to purchase equipment from third party vendors unless controls exist to ensure equipment compatibility with the cable system); SquareD Comments at 9 (does not advocate subscriber ownership of descrambling devices without operator permission).

[710] Armstrong Comments at 22-23; Continental Comments at 38; InterMedia Comments at 23-24; see also Discovery Comments at 16; but see Austin Comments at 56.

[711] AdelphiaII Reply Comments at 37 (provided this is part of a standard that deregulates rates for such equipment); BellAtlantic Reply Comments at 20 n.49; GTE Comments at 14; ThousandOaks Comments at 23.

the costs to be recovered through equipment and installation rates and for calculating those rates. The Commission believes that our guidelines satisfy the statutory requirements, and thus a local franchising authority's proper use of them to determine reasonable rate levels cannot form the basis of a cable operator complaint to the Commission.[712]

295. Under our guidelines, a cable operator shall establish an Equipment Basket to which it will assign the direct costs of service installation, additional outlets, and leasing and repairing equipment.[713] The basket will include an allocation of all those system joint and common costs that service installation, leasing, and equipment repair share with other system activities, excluding general system overhead.[714] The costs contained in the Equipment Basket shall include a reasonable profit.[715] An operator must also calculate an Hourly

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[712] This will not preclude cable operators from complaining about whether the local franchising authority applied our methodology in a reasonable manner.

[713] The Equipment Basket shall not include the operator's direct costs of equipment sold to customers.

[714] Excluding general system overhead will simplify the cost showing for the Equipment Basket because a cable operator will not have to calculate these costs, unless the operator chooses to make a cost-of-service showing. In addition, this exclusion will reduce the burden for local franchising authorities because they will not be required to review and evaluate the methodology for determining general system overheads. We believe that this decision is consistent with Congress' intent to keep rates for equipment and installation low.

[715] The Commission has prescribed 11.25 percent as a reasonable rate of return for the provision of regulated interstate access service by local exchange carriers. Represcribing the Authorized Rate of Return for Interstate Services of Local Exchange Carriers, 5 FCC Rcd. 7507 (1990), on recon. 6 FCC Rcd 7193 (1991), aff'd sub. nom., Illinois Bell Tel. Co. v. FCC, No. 91-1020, Slip Op. (D.C. Cir. April 2, 1993). We believe that it is reasonable to utilize a similar return at the onset of regulation for installation of service and the provision of equipment by cable operators. Thus, at least initially, we will employ 11.25 percent as our standard. Cable operators therefore may incorporate a reasonable profit not to exceed 11.25 percent of the costs contained in the Equipment Basket. To the extent that a cable operator believes this standard, as applied in individualized circumstances, does not enable the operator to maintain the financial integrity of its regulated operations and attract new capital to the business, the cable operator may make a showing to justify an increase in the

Service Charge (HSC) through which it would recover all Equipment Basket costs (including a reasonable profit) except for the operator's capital costs of remotes, converter boxes and other customer equipment up to the time it is leased to the subscriber.[716]

296. Charges for leasing remotes[717] shall be designed to recover the operator's cost of purchasing and financing the lease of the remote and expected repair and service costs over the useful life of the equipment. Expected repair and service costs will be determined by multiplying the estimated number of repair and service hours per remote by the HSC. We anticipate that cable operators will use their past experience and historical data to make the best estimate of the number of service and repair hours for remotes. Charges for leasing converter boxes and all other equipment will be calculated in the

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permitted profit level. Through industry surveys, future reporting by cable operators, and the comments we will receive in our Second Further Notice on cost-of-service standards, we hope to refine our understanding of regulated cable operators' cost of capital and acquire more information concerning the risks of regulated provision of equipment. As we gain more experience in this area, we may revisit our initial determination regarding the reasonable profit standard for equipment.

[716] The HSC would be computed by taking the sum of all equipment basket costs except purchase cost of all equipment, and dividing that sum by the operator's total annual person hours dedicated to leasing, installing and equipment repair services. These estimates would be subject to verification using historical data.

[717] Some cable operators currently charge an additional monthly fee to enable converter boxes to work with a subscriber's universal remote control device. We recognize that not all converter boxes have the capability of working with a remote control device, and those boxes with remote capability may have higher costs. Therefore, we believe the cost of this service should be recovered in the charge for the type of converter box that is compatible with remote control devices instead of a monthly enabling charge. An operator may, however, require subscribers to pay a reasonable fee if a service call is necessary either to enable the converter box to work with the remote or to replace the subscriber's box with a converter that is compatible with the remote. At this time, we will not require cable operators to provide converter boxes that are compatible with universal remotes. But see Notice of Inquiry , ET Docket No. 93-7, supra note. 669.

same manner as for remotes.[718] For installation charges,[719] the cable operator must elect a uniform installation charge that is calculated based upon either: (1) the HSC times the person hours of the visit;[720] or (2) the HSC times the average hours spent per installation visit.[721]

297. The Commission believes that our guidelines comply with statutory requirements by developing charges for equipment and installation on the basis of actual cost. At the same time, this methodology strikes a balance between determining the actual cost for each type of equipment and installation, and simplifying the cost showing for operators and franchising authorities. The Hourly Service Charge Cost allows operators to aggregate certain joint and common costs that might be difficult to directly allocate, and then uses time spent in related activities as the factor for allocating these costs to the various charges.

298. These guidelines will not preclude an operator from selling equipment to subscribers.[722] Where an operator chooses to do so, the equipment price shall be set no higher than necessary to recover the operator's costs, including all costs incurred for storing and preparing the equipment for sale up to

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[718] For an explanation of calculating charges for additional connections, see paras. 306-307, infra.

[719] Consistent with our initial determination, an operator may elect to establish a one-time charge for service installation or recover the costs through a series of monthly charges. See Notice, 8 FCC Rcd at 526 and n. 100.

[720] This option would eliminate the need for lower charges for already wired homes and surcharges for extra long drops. Installations of already wired homes will involve less time and thus lower charges. Although the cost of the drop is not recovered as customer equipment, installations involving extra long drops will take more time, leading to a higher charge.

[721] Under this option, there must be several averages: one for unwired, another for prewired installations, one for installation of additional connections at the time of initial installation, and finally one average for installation of additional connections after initial service installation. In addition, an operator might wish to develop over average installation rates, such as one for installation, involving extra long drops.

[722] As stated in the Notice, this alternative is consistent with the view that Congress's main concern was preventing customers from paying for equipment many times over through monthly rental fees. Notice, 8 FCC Rcd at 526, n.100.

the time it is provided to the customer, plus a reasonable profit. The purchaser would be responsible for maintaining and repairing any purchased equipment, but cable operators may also sell service contracts. The price of these contracts shall be based on the HSC times the estimated average number of hours required for maintenance and repair over the expected life of the equipment. Although the Notice proposed allowing subscribers who purchase on time from the operator to change their mind and discontinue their monthly payments when competitive offerings become available, we believe that current information on the competitive marketplace for equipment is insufficient to justify imposing this condition upon operators.[723] Moreover, customers who purchase equipment must accept the risk of a cable system upgrade that might make their equipment incompatible with the new cable system technology. However, the operator must provide notice of these risks at the time of sale and notice of any pending changes that would make the equipment incompatible.

(d) Promotions

299. The statute is silent on the issue of promotional offerings for equipment and installation. The Notice observed that many operators charge less than actual costs for service installation as part of their marketing efforts. The Notice asked whether the Act's actual cost standard for equipment and installation reflects a legislative intent to prohibit such promotional offerings. We further asked whether it would be consistent with Congressional intent to permit promotional offerings to continue because they increase service penetration, thereby permitting operators to realize economies of scale that could reduce overall costs of providing cable services to subscribers.[724]

ii. Comments.

300. Virtually all commenters agree that Congress did not intend to prohibit promotional offerings.[725] Many commenters describe the consumer benefits from promotional offerings and the

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[723] See para. 282, supra discussing the Commission's rulemaking proceeding concerning equipment compatibility.

[724] Notice, 8 FCC Rcd at 527.

[725] See, e.g., AdelphiaII Comments at 76; TimeWarner Comments at 129; Carib Comments at 12-13; NATOA Comments at 50; CFA Comments at 133; Discovery Comments at 15; but see Multiplex Comments at 12 (Commission should not allow promotional offerings because they would be underwritten by the cable company's monopoly operation and used to suppress competition); SDA Comments at 12.

importance of expanding the customer base through promotions.[726] NCTA argues that the purpose of actual cost requirements was to protect basic subscribers from high charges for equipment and installation, rather than to protect competitive suppliers from predatory rates that are too low.[727] Parties to this proceeding, however, disagree over possible limitations on the recovery of the costs of promotional offerings. Several cable operators propose a basket or pool approach to the regulation of equipment and installation. That method would allow operators to recover the costs of promotional offerings from other equipment, installations, or additional outlets as long as the entire equipment basket recovered only its actual costs.[728] Other operators suggest allowing cable companies to recover the costs of promotional offerings through cable programming services rates.[729] Local authorities and consumer groups would limit an operator's ability to recover the cost of promotions. CFA and NATOA assert that promotional offering are acceptable only if operators absorb the cost of promotions from the reasonable profit they are permitted under the Act.[730] Similarly, Minn contends that the cost of promotional offerings should not be charged back as a loss or overhead cost applicable to the basic rates of other subscribers.[731] CFA further suggests that the Commission should monitor promotional pricing and reevaluate the issue if promotions interfere with the development of competition in the equipment and installation markets.[732]

iii. Discussion

301. The Commission agrees with commenters that Congress did not intend to prohibit promotional offerings. As the Notice and many parties discussed, promotional offerings help to increase subscribership that may permit the operator to

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[726] Armstrong Comments at 23; CATA Comments at 34; CIC Comments at 39; Cox Comments at 35; InterMedia Comments at 24; NCTA Comments at 52.

[727] NCTA Comments at 52; see also Discovery Comments at 16.

[728] AdelphiaII Comments at 82-83; Blade Comments at 13; Falcon Comments at 47-48; Nashoba Comments at 81-82; NCTA Comments at 53-54; TimeWarner Comments at 65.

[729] CIC Comments at 39 and n. 45; Cox Comments at 35 and n. 33.

[730] CFA Comments at 134; NATOA Reply Comments at 30, n. 64.

[731] Minn Comments at 15.

[732] CFA Comments at 135.

increase its overall revenue by increasing volume and its net revenue by realizing certain economies of scale. Accordingly, cable operators will be afforded substantial discretion to offer promotions, including a below cost offering of some equipment and installations.[733] However, while the statute does not preclude promotional offerings, neither does it envision that all equipment and installations can be offered at a below cost basis. We believe that the broad intent of Congress to protect consumers will be best served by an implementation of Equipment Basket rate regulation that affords subscribers a reasonable range of service options. Therefore, instead of allowing cable operators unlimited discretion to price all equipment and installation below cost, we will additionally require that below cost offerings be reasonable in scope in relation to the operator's overall offerings in the Equipment Basket.[734] This will afford operators the initial discretion to fashion the mix of promotional and actual cost offerings of equipment and installation, while permitting evaluation by regulators of the operator's overall Equipment Basket offerings to assure that they best serve the interests of subscribers.

302. In addition, certain limits on cable operator discretion to recover their costs should be imposed. If we accept the basket or pool proposal proffered by NCTA and individual operators, an operator would have the ability to recover all the cost of promotional offerings by increasing the price of one type of equipment, such as remotes. As discussed above, Congress expressed particular concern over the monthly rates charged for leased remotes. We think that Congress intended the actual cost standard for equipment and installations to prevent this type of pricing. Under a general cost-of-service showing we will allow costs of promotions to be recovered as general system overhead. Therefore, under our rules, cable operators cannot include costs of promotions as part of equipment charges.[735] We believe that below cost pricing for equipment and

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[733] As discussed, charges for equipment must be unbundled from basic service charges. This includes charges for equipment and installation offered on a promotional basis.

[734] These offerings must not violate any other regulations imposed upon cable operators. See, e.g., Report and Order, MM Docket No. 92-262, Implementation of Section 3 of the Cable Television Consumer Protection and Competition Act of 1992, Buy-Through Prohibition, FCC 93-143 (released April 1, 1993) (limiting to a reasonable length any discounts or special pricing to encourage nonsubscribers to become cable subscribers).

[735] The cost of a promotion is the difference between a charge based on our prescribed actual cost methodology and the promotional charge.

installation does not violate the actual cost standard incorporated in the Act as long as our regulations ensure that an operator does not charge other customers equipment or installation rates that would exceed our actual cost guidelines, and the total revenues for equipment and installation do not exceed actual costs.[736] In addition, the Commission recognizes that promotional offerings may interfere with the development of a competitive market.[737] We will review this treatment of promotional offerings as we address the issue of whether we should take steps to promote a competitive market for equipment.[738]

(e) Additional Connections

i. Background.

303. Section 623(b)(3)(B) of the Cable Act of 1992 specifically directs the Commission to establish, on the basis of actual cost, rates for installation and monthly use of connections for additional television receivers. The Notice tentatively concluded that cable operators should base the rates for installation of connections for additional receivers on the same costs associated with other installations. Thus, if additional connections are installed at the same time a subscriber's initial service is installed, cable operators would be limited to recovering the incremental costs of the additional installation. In addition, we requested comment on the costs associated with providing connections for additional television receivers and tentatively concluded that the cost of cabling used for additional connections should be recovered in the same manner as the costs of other equipment. We specifically requested comment on any costs associated with technical requirements, such

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[736] Under our rules, the cable operator must include the costs of all equipment and installations in the Equipment Basket. However, instead of recovering all such costs through our actual cost methodology, the operator may elect as a promotion to reduce charges for some of this equipment and installation. Because rates for cable service will be limited by benchmarks at levels not set to recover Equipment Basket costs, operators will not be able to increase rates for cable service to permit a recovery of those promotional costs, unless the cable operator can justify higher rates based on a cost-of-service showing. Thus, the Equipment Basket and our framework for regulation of equipment rates and service rates will serve as a cap on total equipment charges based on actual costs.

[737] See Multiplex Comments at 12; SDA Comments at 12.

[738] See Notice of Inquiry, ET Docket No. 93-7, supra n. 669.

as boosting a signal, involved in providing additional connections.[739]

ii. Comments.

304. Commenters disagree over the extent to which Section 623(b)(3)(B) of the Act governs rates for the provision of additional connections. Some operators claim that this provision covers service installation and equipment used with additional connections, but not the service or programming component of additional outlets. The type of regulation of the service component depends on the level of service being provided, they argue.[740] Other parties contend that operators should not charge for the programming services received over additional connections, because these programming costs are recovered in the charge for cable service at the primary receiver.[741]

305. Many operators argue that additional connections entail added costs, such as capital expenditure required to engineer the system to be capable of serving multiple sets in a home, extra power and plant costs needed to deliver adequate signal to additional outlets, additional repair and maintenance service.[742] Simmons estimates it costs an extra $1050 per mile

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[739] Notice, 8 FCC Rcd at 527.

[740] AdelphiaII Comments at 79-80; CSC Comments at 4; Falcon Comments at 45-46; Nashoba Comments at 78-79; Newhouse Comments at 27-28; Simmons Comments at 1 (those systems that offer the option of having only basic service on additional outlets should be allowed to charge the actual cost of the outlet to basic subscribers. Such systems should be able to make an additional charge for the cable programming service and premium television services provided on the same additional outlet); TimeWarner Comments at 62-63; see also SSO Comments at 17 (only the additional wiring required for reception of basic service on an additional outlet should be rate regulated on an actual cost basis. The other equipment associated with additional outlets, such as these converter boxes and remotes which are not necessary for the reception of basic service, should be "regulated as luxury items.")

[741] Multiplex Comments at 13; NATOA Comments at 50-51; SquareD Comments at 12; see also CalCities Comments at 19-20; Palm Comments at 17-18; Pappas Comments at 1.

[742] See Armstrong Comments at 25; Carib Comments at 14; Continental Comments at 37; InterMedia Comments at 26; Lenfest Comments at 8; Simmons Comments at 2. Because additional costs are related to extra trouble calls, more wiring and consumer equipment, and higher failure rates, operators suggest inside wiring

because of the additional signal power level required for additional outlets.[743] Armstrong and InterMedia assert that an operator should not be prohibited from folding the actual cost of additional outlets into basic service and offering whole house service without a direct charge for additional outlets.[744] On the other hand, Lenfest claims the Commission should adhere to its policy of unbundling, and require customers with additional outlets to bear the costs of providing and maintaining such service to their homes.[745] Some operators offer the same cost methodology for installation of additional connections as they propose for installation of other equipment.[746]

iii. Discussion

306. Commenters generally agree that Congress intended Section 623(b)(3) to cover the installation of, and equipment used with, additional connections. Therefore, the costs associated with additional connections will be included in the Equipment Basket. To simplify our regulation, we believe that operators should recover the costs of additional connections in the related equipment and installation charges. Thus, the installation costs would be recovered as an installation charge, as will the costs of remotes and other equipment. The installation charge for additional connections would be the HSC times the person hours of the visit or HSC times the average hours spent per visit. If the operator elects to use an average installation time, we would expect two rates: one for wiring additional connections at the time of installation and another if the operator makes a separate visit to install the additional connection. In either case, we anticipate a much smaller charge for installing additional outlets at the same time initial service installation occurs than for installations which require a separate visit to the subscriber's home. Remotes, converter

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maintenance agreements may be a better alternative to separate monthly charges for additional outlets. Armstrong Comments at 25; InterMedia Comments at 26.

[743] This includes the capital expenditure (including financing), the actual cost of wiring in the customers home, the additional cost of CLI compliance, the additional cost of service calls required to maintain the additional outlets, and a reasonable profit. Simmons Comments at 2.

[744] Armstrong Comments at 25; InterMedia Comments at 26.

[745] Lenfest Comments at 8.

[746] AdelphiaII Comments at 79; Falcon Comments at 45-46; Nashoba Comments at 78; Newhouse Comments at 27-28; TimeWarner Comments at 62.

boxes and other equipment involved would be leased to the customer at the same rate as equipment used with primary outlets.

307. The remaining issue is whether our guidelines should allow operators to charge for any other costs or services relating to additional connections. We disagree with commenters who argue that Section 623(b)(3) does not address the programming portion of additional connections. The statute specifically covers the "monthly use" of additional connections. These connections are used to receive programming. Thus, if an operator incurs additional charges for programming carried on basic or cable programming channels that it transmits to additional outlets, those charges would be properly recovered through a monthly charge levied for additional outlets in fact receiving that programming.[747] That monthly charge would be limited to the operator's additional programing costs. We recognize that there are costs associated with designing and building a cable system that can provide a signal strong enough to serve more than one outlet in a home. Any network costs for boosting the signal should be treated as part of general system overhead. If a subscriber requests additional connections that exceed network design capabilities and require additional customer premises equipment, the cable operator may recover the costs of the additional equipment through an additional connection charge. That charge would be developed using our actual cost guidelines for other customer equipment. An additional connection charge is permissible only to recover

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[747] We do not believe that the statute precludes cable operators from establishing reasonable categories of cable service customers with reasonable restrictions on the number of additional connections that may be obtained with each primary service outlet. While we believe that Congress intended that residential customers will generally be able to obtain the additional connections they need with one primary service outlet charge, we conclude that the statute does not prevent cable operators from establishing reasonable limits on the number of additional connections for each primary outlet in commercial or residential installations other than single family installations. Cable operators are thus permitted to establish reasonable multiple primary service charges, including reasonable discounted primary service charges, in non-commercial installations and residential installations other than single family installations. Single family installations would include residential units within a multifamily dwelling. Under the procedures we are establishing for the basic service tier, local franchise authorities will be able to review the operator's establishment of service categories along with other aspects of the operator's basic service tier offering. See also our discussion of geographically uniform rate structure and discrimination at Sections II.A.5, infra.

additional programming costs, if any, and the costs of additional customer premises equipment needed to boost the operator's signal.

(4) Costs of Franchise Requirements

i. Background

308. The Cable Act of 1992 requires that our rate regulations for the basic service tier include standards to identify costs that are attributable to satisfying franchise requirements to support public, educational and governmental channels, to the use of such channels or to any other services required under franchise.[748] The Notice tentatively concluded "that the purpose of this statutory requirement is to assure the establishment of standards that will permit the cable operator to identify on subscriber bills pursuant to Section 622(c)(2) the amount of the bill attributable to franchise requirements."[749] We also tentatively concluded that the costs attributable to satisfying franchise requirements should include:

> 1) any direct costs of providing any services required under the franchise; 2) the sum of per channel costs for the number of channels used to meet franchise requirements for public, educational, and governmental channels; and 3) a reasonable allocation of overhead.[750]

309. The Notice presented two proposals for determining the amount that could be reported on the franchise costs line of a subscriber's bill. Under the first alternative we would adopt, at least in part, a cost-based regulatory alternative, with the per channel costs and allocation of overhead, for purposes of implementing Section 622(c)(2) of the Communications Act, being determined in accordance with the proposed accounting and cost allocation rules set forth in Appendix A of the Notice.[751] In the alternative, if we decided not to adopt the accounting and cost allocation rules set forth in Appendix A, we proposed to require cable systems to use "reasonable methods to determine per channel costs and

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[748] Notice, 8 FCC Rcd at 527, para. 72 citing Communications Act § 623(b)(4), 47 U.S.C. § 543(b)(4).

[749] Notice, 8 FCC Rcd at 527, para. 73.

[750] Notice, 8 FCC Rcd at 527, para. 73.

[751] Notice, 8 FCC Rcd at 527, para. 73.

allocations of overhead."[752] We solicited comment on both of these proposals.

ii. Comments

310. Several municipalities state that cost of franchise requirements should include a reasonable allocation of overhead that is directly attributable to public, educational and governmental channels.[753] Most commenting municipalities maintain the position that cost of franchise requirements should be limited to direct costs directly required by the franchise.[754] These parties advocate differing methods on how to achieve this result. Minn argues that if any allocation is to be made for the costs of public, educational and governmental channels, the cable operator must show that absent the allocation for public, educational and governmental channels, the channel would have been used for a commercial purpose.[755] Minn disagrees with the Commission's tentative conclusion that cost of franchise requirements should include a sum for per channel costs for the number of channels used to meet franchise PEG requirements.[756] Minn further asserts that a cable operator should not be allowed to claim costs for public, educational and governmental channels unless the Commission's regulatory scheme also reflects benefits

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[752] Notice, 8 FCC Rcd at 527, para. 73.

[753] See, e.g., Minn Comments at 16; and Lakeville Reply Comments at 5.

[754] See, e.g., Austin Comments at 56; Minn Comments at 15; NATOA Comments at 53; Lake Forest Reply Comments at 4; Liberal Reply Comments at 5-6; Lincoln Reply Comments at 4-5; Louisville Reply Comments at 3-4; Madison Reply Comments at 3-4; Mankato Reply Comments at 4-5; Marshall Reply Comments at 3-4; Mentor Reply Comments at 4; MACC Reply Comments at 4-5; Dade Reply Comments at 9; Mt. Prospect Reply Comments at 4-5; Multnomah Reply Comments at 4-5; Niles Reply Comments at 4; Oakland Reply Comments at 4; Ottawa Reply Comments at 2; Owensboro Reply Comments at 4-5; Palm Desert Reply Comments at 4-5; Phillipsburg Reply Comments at 4-5; Piscataway Reply Comments at 4-5; Prince George Reply Comments at 5-6; Ramsey Reply Comments at 4-5; Reidsville Reply Comments at 4-5; Salina Comments at 4-5; San Antonio Reply Comments at 5; Tallahassee Reply Comments at 4; Titusville Reply Comments at 4-5; Union Reply Comments at 4-5; and Worthington Reply Comments at 5.

[755] Minn Comments at 16.

[756] Minn Comments at 16.

received from commercial cable television, such as advertising revenues.[757]

311. Several municipalities assert that the identification of costs related to a franchise should be reviewed in the regulatory process governing basic rates.[758] These same municipalities are concerned about consumers being billed twice for cost of franchise requirements.[759] They note that the Cable Act of 1984 provided that franchise fees that were already incorporated in the rates were not to be added to the subscriber's bill, while an increase in the franchise fee could be added.[760] These parties recommend that the Commission look to Section 622(c) of the Cable Act of 1984 for guidance on this issue.[761]

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[757] Minn Comments at 16.

[758] See, e.g., Atlanta Reply Comments at 4; Fairborn Reply Comments at 4; Georgetown Reply Comments at 4; Greensboro Reply Comments at 4; Greenville Reply Comments at 5; Henderson Reply Comments at 4; IowaCity Reply Comments at 4; Kinston Reply Comments at 4; Laurens Reply Comments at 4; Laurinberg Reply Comments at 4; Owensboro Reply Comments at 4; Piscataway Reply Comments at 4; Reidsville Reply Comments at 4; Titusville Reply Comments at 4; Union Reply Comments at 4; Worthington Reply Comments at 5.

[759] See, e.g., Atlanta Reply Comments at 4; Fairborn Reply Comments at 4; Georgetown Reply Comments at 4-5; Greensboro Reply Comments at 4; Greenville Reply Comments at 5; Henderson Reply Comments at 5; IowaCity Reply Comments at 4; Kinston Reply Comments at 4; Laurens Reply Comments at 4-5; Laurinberg Reply Comments at 4; Owensboro Reply Comments at 5; Piscataway Reply Comments at 4-5; Reidsville Reply Comments at 4-5; Titusville Reply Comments at 4-5; Union Reply Comments at 4-5; and NATOA Comments at 51-52.

[760] See, e.g. Atlanta Reply Comments at 5; Fairborn Reply Comments at 6; Georgetown Reply Comments at 5; Greensboro Reply Comments at 5; Greenville Reply Comments at 5; Henderson Reply Comments at 5; IowaCity Reply Comments at 5; Kinston Reply Comments at 5; Laurens Reply Comments at 5; Laurinberg Reply Comments at 5; Owensboro Reply Comments at 5; Piscataway Reply Comments at 5; Reidsville Reply Comments at 5; Titusville Reply Comments at 5; Union Reply Comments at 5; Worthington Reply Comments at 5.

[761] See, e.g. Atlanta Reply Comments at 5; Fairborn Reply Comments at 6; Georgetown Reply Comments at 5; Greensboro Reply Comments at 5; Greenville Reply Comments at 5; Henderson Reply Comments at 5; IowaCity Reply Comments at 5; Kinston Reply Comments at 5; Laurens Reply Comments at 5; Laurinberg Reply Comments at 5; Owensboro Reply Comments at 5; Piscataway Reply Comments at 5; Reidsville Reply Comments at 5; Titusville Reply Comments at 5;

312. AdelphiaII contradicts the assertion that the only costs that are addressed in Section 623(b)(4) of the Communications Act are those costs that are attributable to public, educational and governmental channel franchise requirements, which excludes costs attributable to franchise requirements in general.[762] AdelphiaII further alleges that the statutory language is clear and the Commission is to prescribe regulations that include "standards to identify costs attributable to satisfying franchise requirements to support" public, educational and governmental channels "or the use of such channels or any other services required under the franchise."[763]

313. For the most part, cable operators maintain that costs attributable to franchise requirements must include local origination, I-Nets and other municipal costs.[764] Several cable operators also feel that access costs should include capital, personnel and other related operating expenses.[765] Other cable operators argue that copyright fees should also be included as a cost of franchise requirement.[766]

314. Cable operators argue against the Commission adopting its proposed cost allocation and uniform accounting standards to identify costs and revenues, because they are too complex and burdensome.[767] Instead, these parties suggest, the Commission should rely on good faith allocation by cable operators, consistent with generally accepted accounting principles.[768]

iii. Discussion

Union Reply Comments at 5; Worthington Reply Comments at 5.

[762] AdelphiaII Reply Comments at 45.

[763] AdelphiaII Reply Comments at 45-46, quoting Communications Act § 543(h)(4), 47 U.S.C. § 623(b)(4).

[764] See, e.g., Continental Comments at 41; New England Reply Comments at 9-10; and Cole Comments at 32.

[765] See, e.g., Continental Comments at 41; and Cole Comments at 32-33.

[766] See, e.g., New England Reply Comments at 10.

[767] See, e.g., Nashoba Comments at 87; AdelphiaII Comments at 88; and Falcon Comments at 52.

[768] See, e.g., Nashoba Comments at 87; AdelphiaII Comments at 88; and Falcon Comments at 52.

315. We believe that we should adopt a standard for identification of costs attributable to franchise requirements that accurately reflects such costs without unduly burdening cable operators. Such costs should include any direct costs and per channel costs. We believe that overhead costs should be included because overhead costs are necessarily incurred in addition to indirect costs in satisfying franchise requirements. Further, the costs of franchise requirements can be determined in accordance with the general cost accounting rules we are adopting for implementation of other portions of the Cable Act of 1992. Thus, identification of the costs attributable to franchising requirements in accordance with these rules should not be unduly burdensome. Accordingly, we are adopting the proposal in the Notice that the costs attributable to satisfying franchise requirements shall include:

> 1) the sum of per channel costs for the number of channels used to meet franchise requirements for public, educational, and governmental channels; 2) any direct costs of providing any other services required under the franchise; and 3) a reasonable allocation of overhead.[769]

(5) Customer Changes

i. Background.

316. The Cable Act of 1992 requires that regulations for the basic tier include standards and procedures to prevent unreasonable charges for a customer changing equipment or service tiers. Charges for changing the service tier must be based on cost.[770] The Notice tentatively concluded that regulations adopted to implement Section 623(b)(5)(C) should apply to any changes in the number of service tiers that are initiated at the subscriber's request after installation of initial service.[771] Consistent with the language of the Act, we proposed to require that charges for changing service tiers not exceed a nominal amount "when the system's configuration permits changes in service tier selection to be effected solely by coded entry on a computer terminal or by other similarly simple method."[772] We

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[769] Notice, 8 FCC Rcd at 527, para. 73.

[770] Communications Act § 623(b)(5)(C), 47 U.S.C. § 543(b)(5)(C).

[771] Notice, 8 FCC Rcd at 527.

[772] Notice, 8 FCC Rcd at 527-28 citing Communications Act, § 623(b)(5)(C), 47 U.S.C. § 543(b)(5)(C).

requested comment on whether and, if so, at what level we should set the nominal amount when this condition is met.

317. For changes in service tiers at the subscriber's request, not made by coded entry and other simple methods, the Notice sought comment on two alternative proposals. Under the first proposal, we would require that charges be based on the actual costs of making service tier changes, including any direct costs and a reasonable allocation of indirect costs and overhead and a reasonable profit. Under the second alternative, we would require charges for all changes in service tiers to recover only nominal costs.[773] The Commission solicited comment on whether Congress intended for Section 623(b)(5) to apply to changes in equipment generally or only to changes in equipment associated with changes in service tiers. The Commission also solicited comment on applying our proposed alternatives to define reasonable charges for changing equipment, and whether Congress intended for cable operators to make a reasonable profit on changes in equipment. Finally, the Notice requested comment on whether the implementation of this rulemaking could encourage customers to change service tiers and whether costs associated with initial retiering should be treated in a different manner from subsequent customer changes in service.[774]

ii. Comments

318. Many commenters discuss whether the Commission should in some way limit the scope of regulations implementing Section 623(b)(5)(C) of the Cable Act. Several operators urge the Commission to limit its rules for service changes to those that affect basic service.[775] Other parties argue that the regulations should apply to any changes in the level of service

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[773] Notice, 8 FCC Rcd at 528. We noted that the latter alternative could help keep charges for changes in service tiers low, but could increase burdens and costs on cable operators for this activity by encouraging subscribers to order service changes more frequently. In addition, it would require that the costs of customer changes be recovered from other services. Id.

[774] Notice, 8 FCC Rcd at 528.

[775] CIC Comments at 39-40; Cox Comments at 36; see also TCI Comments at 40 (charges assessed for changes to or from basic tier or changes by customers receiving cable programming services must be based on the cost of such change); TimeWarner Comments at 66 (cable programming services should be regulated under an unreasonable standard outside of Section 623(b)(5)(C) of the Communications Act and charges for changes between and among expanded tiers and premium programming should be free of regulation).

tiers that are initiated at the subscriber's request after installation of service.[776] Continental contends that the statutory provision does not apply to changes in equipment independent of changing the service tier.[777] NATOA disagrees and argues that the Commission's regulations should also limit the charges for other changes a subscriber may request such as change in equipment. For example, activation charges for subscribers who want to use their own remote control devices rather than those supplied by the operator.[778] Many local franchising authorities also assert that under certain circumstances, operators should not be allowed to charge for service tier changes.[779] For example, no charges for downgrading or changing tiers for 30 days from the date of a rate increase or retiering.[780]

319. Although many commenters agreed that charges for changing service tiers effected by coded entry or other similarly simple method should be nominal,[781] few commenters suggested a level at which we should set the nominal amount.[782] Several operators argue that our rules should allow for the recovery of significant investment costs associated with systems that allow changing service tiers by coded entry.[783] In addition, many

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[776] Minn Comments at 17; NewBedford Comments at 6; Somerville Comments at 6.

[777] Continental Comments at 43.

[778] NATOA Comments at 54.

[779] Baltimore Comments at 10; LowerMerion Reply Comments at 5; NewBedford Comments at 6; Rapids Comments at 36; Somerville Comments at 6.

[780] NewBedford Comments at 6; Rapids Comments at 36; Somerville Comments at 6; see also LowerMerion Reply Comments at 5 (90 days).

[781] Armstrong Comments at 25; Baltimore Comments at 10; InterMedia Comments at 26; Lakeville Reply Comments at 5; Minn Comments at 17.

[782] See Carib Comments at 15-16 (should treat these like returned check charges because they require similar functions); Rapids Comments at 36 (five dollars); Tallahassee Comments at 4 (no charge unless a technician is dispatched to a customer's home).

[783] CIC Comments at 41 n.47 (should include cost of designing and building the requisite electronics into the cable plant); Cole Comments at 33 (equipment costs related to addressable technology); Continental Comments at 42 (cost of addressable technology).

cable operators expressed concern that if the charge for changing tiers is very low, subscriber churn will become a problem.[784] Several operators suggest that we allow charges to escalate if a particular subscriber orders multiple changes within a certain period of time.[785]

320. Some commenters agreed with the Commission's proposal to require nominal charges for all changes in service.[786] Similarly, Rapids suggests limiting operators to a recovery of direct costs plus a nominal contribution to joint and common costs.[787] However, NYSCCT points out that if the Commission limits all changes to nominal charges, the costs of some customer changes would be subsidized by all subscribers. According to NYSCCT, it is not sound policy to require subscribers to subsidize the browsing habits of other subscribers.[788] Another suggestion would involve a fully distributed cost methodology.[789] Several cable operators suggested that charges for changes in service tiers not effected by coded entry on a computer terminal or other similarly simple method should be compared to installation charges for a reasonableness comparison.[790] Operators also suggest that the Commission minimize the administrative burdens of this provision by creating a presumption of reasonableness where downgrade charges are at or below the price levels for upgrades. This suggestion assumes that Congress was concerned that excessive change charges were being imposed as a means of discouraging cable subscribers from downgrading service. Upgrade rates can be

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[784] Cole Comments at 34; Continental Comments at 42; MediaGeneral Comments at 13; TCI Comments at 40; TimeWarner Comments at 67. These operators generally argue that churn increases operating costs and complicates business planning. Cole Comments at 34; Continental Comments at 42; TCI Comments at 40; TimeWarner Comments at 67.

[785] TCI Comments at 40-41; TimeWarner Comments at 67; se also NYConsumers Comments at 10.

[786] Conn Comments at 12; NewBedford Comments at 6; Somerville Comments at 6.

[787] Rapids Comments at 36.

[788] NYSCCT Comments at 22.

[789] Continental Comments at 42; Schaumburg Comments at 9.

[790] Armstrong Comments at 24; InterMedia Comments at 25; TCI Comments at 40; TimeWarner Comments at 66-67; see also Tallahassee Comments at 4 (cable operator should apply no more than half the charge of the initial installation for service changes).

expected to be reasonably low because the operator has an incentive to promote subscription to all of its programming.[791] NATOA disagrees with this presumption.[792]

iii. Discussion

321. We adopt our tentative conclusion that regulations to implement Section 623(b)(5)(C) should apply to any changes in the number of service tiers that are initiated at the subscriber's request after installation of initial service.[793] These regulations will include charges for changing equipment. We believe that the same standards should apply to upgrades and downgrades in service tiers because the same costs are involved in both types of changes.[794] The Commission agrees with commenters who argue that customers should be allowed 30 days after notice of retiering or rate increases to change service tiers at no charge.[795]

322. As required by statute, operators may impose only a nominal charge for changing service tiers effected solely by coded entry on a computer terminal or by other similarly simple method. We will consider any charge under $2.00 to be nominal. Because the record contains virtually no comment on what constitutes a nominal amount, we will allow franchising authorities discretion to consider additional community specific factors in evaluating these charges. However, these charges cannot exceed the actual costs, as defined below, of changing service tiers. We recognize that nominal charges for changing tiers have the potential to increase customer churn, but we do

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[791] TCI Comments at 41; TimeWarner Comments at 67-68.

[792] NATOA Reply Comments at 19, n.48.

[793] As an initial matter, some parties request clarification that any regulations regarding changes in service promulgated by the Commission should preempt existing state laws or regulations on the matter. CTANY Comments at 1-2; NewBedford Comments at 6; Somerville Comments at 6. We believe that any state laws that prohibit charges for changing service tier would be preempted to the extent that they conflict with Commission rules implementing Section 623(b)(5)(C), which requires cost-based charges for changing service tiers. See Communications Act § 636(c), 47 U.S.C. § 556(c).

[794] The statute requires that charges for changing the service tier selected shall be based on cost. Communications Act at § 623(b)(5)(C), 47 U.S.C. § 543(b)(5)(C).

[795] Any costs associated with these changes must be recovered as general system overheads.

not have any specific data on this topic. Therefore, we will create one exception to the cap on rates for changing service tiers effected by coded entry on a computer terminal or other simple methods. Cable operators who believe their system has an increasing and unacceptable level of churn in service tiers, may establish an increased charge for changing service tiers more than two times in one year, provided that such charges are not requested in response to a rate increase or a restoration of tiered service.[796] The operator must prove to the franchising authority that the churn level in cable service tiers has reached an unacceptable level and that its escalating scale of charges is reasonable. In addition, the cable system must notify all subscribers that they will be subject to an increased charge if they change service tiers more than the specified number of times in one year.

323. For changes in service tiers or equipment that involve more than coded entry on a computer or other similarly simple method, we adopt our actual cost guidelines for equipment and installation. The actual cost charge would be either the HSC times the amount of time it takes to effect the change or HSC times the average time such changes take. We believe that this method is reasonable because the costs for changing service tiers and equipment are similar to the costs of service installation. In addition, because of the similarity between the costs of effectuating downgrades, upgrades, and installations, we expect that charges to decrease service will not exceed charges to install or upgrade service tiers. Because operators have incentives to encourage service upgrades by keeping upgrade charges low, we believe that downgrade charges that are lower than upgrade charges would be evidence that the downgrade charges are not above actual costs. The Commission sees no need, at this time, to allow for an increased charge for changes in service tiers not effected by coded entry or other simple methods. We believe that the actual cost charge should create a barrier to excessive churn.

4. Regulation of Cable Programming Services

a. Definition of "Cable Programming Service"

i. Background

324. As noted previously, regulation of "cable programming service" rates and associated equipment is to be conducted by this Commission, not local franchising authorities. The Cable Act defines the term "cable programming service"

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[796] For example, if a customer changes service tiers for a third time in one year, the charge might be $5.00, and the charge for the fourth change might be $10.00.

broadly. The statutory definition includes all video programming provided over a cable system except that provided on the basic service tier or on a per-channel or per-program basis.[797] Focusing on the second exclusion -- i.e., programming offered on a per-channel or per-program basis -- the Notice requested comment on a proposal to exclude from the definition of cable programming service pay-per-channel or pay-per-program premium services offered on a "multiplexed" or time-shifted basis.[798] The Notice also invited comment on whether separate premium services, each falling outside the definition of cable programming service when offered individually, could nevertheless become subject to rate regulation when offered as a package.[799]

ii. Comments

325. The record supports excluding pay-per-channel or pay-per-program premium services offered on a multiplexed or time-shifted basis from the definition of cable programming service.[800] However, the issue concerning possible regulation of collective offerings of otherwise exempt "a la carte" premium services generated sharply conflicting comments. Cable operators and programmers insist that per-channel or per-program premium services should not become subject to regulation simply because cable operators choose to offer the services as a package. They urge the Commission to make clear that such offerings do not fall within the definition of cable programming service and therefore remain exempt from regulation.[801] Municipalities and

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[797] Communications Act, § 623(l)(2), 47 U.S.C. § 543(l)(2).

[798] The House Report defines "multiplexing" as "the offering of multiple channels of commonly-identified video programming as a separate tier (e.g., HBO1, HBO2, HBO3)." House Report at 80.

[799] Notice, 8 FCC Rcd at 531, paras. 95-96.

[800] See, e.g., Discovery Comments at 14; Encore Comments at Att. 1, pp. 7-8; Time Warner Reply at 39; Viacom Reply at 3, 25. CFA supports this view with a caveat. It states that if a multiplexed premium service is packaged together with any other service, it would be the equivalent of a tier and therefore subject to regulation. It also believes that if the programming offered on multiplexed premium services is different in any way other than the time it is offered, it is different programming and must be subject to regulation as a separate tier. CFA Comments at 135-36.

[801] See Carib. Comments at 21-22; Cole Comments at 41-42; Encore Comments at 8-9; Falcon Comments at 63-64; Nashoba Comments at 103-104; Time Warner Comments at 39; Cole Reply at 9; Comcast Reply at 13; Discovery Reply at 10-11; Time Warner Reply at 38; Viacom Reply at 20, 24.

consumer/public interest advocates, in contrast, believe that bundled offerings of otherwise exempt per-program or per-channel premium services are subject to regulation under the Cable Act, even if offered at the same price as if a subscriber purchased each channel separately. This is so, they argue, because such offerings constitute a "tier" of service and the Cable Act requires the Commission to regulate all tiers of service.[802]

iii. Discussion

326. We will exclude from the definition of cable programming service per-channel or per-program premium services offered on a multiplexed or time-shifted basis. This approach is consistent with congressional intent[803] and is supported by the record. Thus, multiplexed or time-shifted offerings of per-channel or per-program services will not be subject to rate regulation complaints so long as they consist of "commonly-identified video programming"[804] and are not bundled with any regulated tier of services.

327. Further, we will not regulate collective offerings of otherwise exempt per-channel or per-program services so long as two essential conditions are met. First, the price for the combined package must not exceed the sum of the individual charges for each component service. This is consistent with the rationale underlying Congress's decision to exempt from regulation per-channel or per-programming services offered on a stand-alone basis. Congress excluded per-channel or per-program service offerings on the basis of a determination that greater unbundling of offerings leads to more subscriber choice and greater competition among program services.[805] Implicit in this congressional determination is an expectation that market forces, rather than regulation, will ensure that rates for unbundled services are reasonable. It follows logically that the rate for a collective offering of such services will also be reasonable to the extent that it does not

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[802] See CFA Comments at 136-138; CFA Reply Comments at 71-72; NATOA Comments at 78-79; NYConsumer Comments at 13.

[803] See House Report at 80 ("The Committee intends for these 'multiplexed' premium services to be exempt from rate regulation to the same extent as traditional single channel premium services when they are offered as a separate tier or as a stand-alone purchase option."); id. at 90.

[804] House Report at 80.

[805] See House Report at 90; Senate Report at 77.

exceed the sum of the charges for the component services.[806] Moreover, we believe cable operators should be free to offer collective offerings at a combined price which is less than the sum of the charges for the individual services. Such discounts benefit the consumer by making premium channels more affordable and thus more widely available.[807]

328. Second, the cable operator must continue to provide the component parts of the package to subscribers separately in addition to the collective offering. This requirement will further Congress's goals of enhancing consumer choice and encouraging greater competition among program services. Importantly, it will guard against potential harm to subscribers by ensuring that they will continue to be able to choose "only those program services they wish to see" and are not forced to pay for "programs they do not desire."[808]

329. We believe the two safeguards described above make it unnecessary to regulate collective offerings of per-channel or per-program offerings. Since market forces are likely to ensure that rates are reasonable and subscribers will continue to be able to select individual per-channel or per-program services, regulation of collective offerings of otherwise exempt "a la carte" services would not serve the purposes of the Cable Act. In fact, regulation in such circumstances might be counterproductive. If cable operators are subjected to regulation and exposed to complaints simply by combining premium services into an integrated package, they likely will refrain from making such offerings -- even when the collective package would be offered at a reduced rate. While municipalities and consumer/public interest advocates urge to us find that such offerings are a "tier" subject to regulation, interpreting the statute in such a literal fashion could disadvantage consumers by denying them discounts on packages of per-channel or per-program

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[806] See Discovery Reply at 10-11 (as long as the channels within the grouping are also separately available, the rates for the entire package must be reasonable).

[807] See, e.g., Cole Reply at 9 (discounted packages extend real value to consumers); Encore Comments at 8-9; Viacom Reply at 24.

[808] Senate Report at 77. This second condition is satisfied only when the per channel offering provides consumers with a realistic service choice. For example, we do not think a cable operator can escape rate regulation simply by announcing that tiered services are available a la carte or by offering the services at a per channel rate that ensures that few subscribers will avail themselves of this option. Under the requirements of the evasion prohibition of Section 623(h), we retain the discretion to review such situations on a case-by-case basis.

services and by limiting subscriber access to a greater quantity of premium programming. We do not believe the statute requires such an anomalous result. Therefore, so long as cable operators observe the two requirements specified above -- the package price may not exceed the sum of the rates for the individual components, and the individual services must continue to be offered separately -- we will not regulate such collective offerings.[809]

b. Complaints Regarding Cable Programming Service Rates

(1) Procedures for Receiving, Considering, and Resolving Complaints

i. Background

330. The Cable Act directs us to adopt rules establishing "fair and expeditious procedures" for receiving, considering, and resolving complaints from "any subscriber, franchising authority, or other relevant State or local government entity" alleging that rates for cable programming service are unreasonable.[810] Accordingly, the Notice sought comment on the statutory minimum showing necessary for a complaint to obtain Commission consideration and resolution, specific forms or language to be used in filing complaints, and the possibility of enlisting the franchising authority to aid subscribers in the complaint process. Further, the Notice asked parties to comment on an appropriate limitations period for the filing of complaints regarding prospective rate increases for cable programming service. The Notice also solicited comment on alternatives that the Commission might employ to determine whether a complaint should go forward and the timing of a cable

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[809] Of course, to the extent that a cable operator bundles such a package with any regulated tier of services, or simply replicates its existing service structure through the rebundling of a la carte services into packages of services, without also continuing to offer these services a la carte, such collective offerings would become subject to regulation.

[810] Communications Act, § 623(c)(1)(B), 47 U.S.C. § 543(c)(1)(B). Congress defined "cable programming service" as all video programming offered over a cable system except that provided on the basic service tier or on a per-channel or per-program basis. This statutory definition also includes the "installation or rental of equipment used for the receipt of such video programming... ." Communications Act, § 623(l)(2), 47 U.S.C. § 543(l)(2). Thus, cable programming service rate complaints may involve allegations of unreasonableness with respect to charges for equipment installation and rental.

operator's response, as well as possible service requirements, pleading cycles, and burdens of proof. In addition, the Notice requested comment on the appropriate treatment of information submitted to the Commission that the cable operator regards as proprietary, as well as rules governing ex parte communications.[811]

ii. Comments

331. Very generally, municipalities, state governments and consumer/public interest advocates urge the adoption of simple, minimal, nontechnical procedures that would enable an ordinary subscriber to voice concern over rates for cable programming service.[812] Cable operators generally seek procedures that afford an expeditious means to determine whether a rate is unreasonable and that discourage frivolous complaints.[813] We describe the record in detail below as it pertains to each stage of the complaint process.

iii. Discussion

332. When Must Complaints Be Filed? Section 623(c)(3) provides that, with one exception, our procedures for cable programming service rate complaints shall be available only in the event of a rate increase occurring after the effective date of our rules. Pursuant to Section 623(c)(3), complaints must be filed within "a reasonable period of time" following a change in rates, including a change in rates resulting from a tiering change.[814] In the Notice, we tentatively found that a time limit of 30 days from the time a subscriber received notification of such a rate change would constitute a "reasonable period" for a subscriber to formulate and file a complaint with the Commission.[815] While cable operators generally support this proposal,[816] municipalities and consumer/public interest

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[811] Notice, 8 FCC Rcd at 532-33, 534, paras. 98-106, 109-110.

[812] See, e.g., AGs Comments at 12; Carbondale Comments at 7; CFA Comments at 138-39; Conn. Comments at 14; NYConsumer Comments at 13; Winter Comments at 2.

[813] See, e.g., Cox Comments at 70; CIC Comments at 73; Falcon Comments at 65-66.

[814] Communications Act, § 623(c)(3), 47 U.S.C. § 543(c)(3).

[815] Notice, 8 FCC Rcd at 533, para. 105.

[816] See Cole Comments at 43; Comcast Comments at 41; NCTA Comments at 74 n.78; NCTA Reply at 69; Time Warner Comments at 47; TCI Comments at 60.

advocates overwhelmingly oppose it and suggest longer time periods in which complainants may file complaints.[817] These commenters contend that 30 days from notification of a proposed rate increase is wholly inadequate to permit the subscriber to become cognizant of the rate increase, determine the proper prccedure, gather necessary information and file the complaint.

333. After reviewing the record, we are persuaded that a somewhat longer period is appropriate to afford complainants a reasonable opportunity to become fully informed of the rate increase for cable programming service or associated equipment and file a complaint with the Commission. Accordingly, we shall require complainants to file such complaints within 45 days from the time a subscriber receives a bill from the cable operator that reflects the rate increase.[818] We believe this modification to our original proposal will provide sufficient time for subscribers and other complainants to become fully cognizant of a rate increase, gather necessary information, and formulate and file a complaint with the Commission. At the same time, this period is not so long as to permit stale complaints. Computing the time period based on customer receipt of a bill reflecting an increase, rather than customer notification of a proposed increase, serves two purposes. First, it will facilitate subscriber knowledge of the nature and extent of the rate increase and allow a subscriber a reasonable period in which to decide whether to contest the increase based on more complete knowledge. While cable operators must give subscribers and franchising authorities advance written notification of a change

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[817] See Austin Comments at 65, 67 (advocating 120 days); CFA Comments at 143-144 (90 days after service change); Commerce Comments at 4 (30 days after implementation of rate increase); Conn. Comments at 14 (90 days from notification of rate increase); Dade Comments at 11 (90 days from receipt of bill reflecting increase); MCATC Comments at 46-47 (60 days); Minn. Comments at 22 (60 days); NATOA Comments at 73 (90 days from time of receipt of first bill reflecting increase); NJ Comments at 22 (90-120 days).

[818] Since, under federal standards, a cable subscriber must be given at least 30 days written advance notice of a proposed rate increase, see Implementation of Section 8 of the Cable Television Consumer Protection and Competition Act of 1992, Consumer Protection and Customer Service, MM Docket No. 92-263, Report and Order, FCC 93-145, at 35-36 & Appendix B, Section 76.309(c)(3)(i)(B) (released April 7, 1993) ("Customer Service Order") (to be codified at 47 C.F.R. § 76.309(c)(3)(i)(B)), this approach as a practical matter will afford subscribers at least 75 days from initial notification to submit a rate complaint.

in cable programming service rates,[819] such notification may not fully inform the subscriber and, as noted by some commenters, the subscriber may not focus on the change until actually seeing it reflected in a bill.[820] Second, as discussed below, subscribers will be able to include a copy of the bill with their complaint, thus providing proof that the complainant is in fact a subscriber of the service and offering concrete evidence of the rate and a description of the service involved.

334. We reject commenters' suggestions for even longer filing periods. An extended filing period not only would risk permitting stale complaints but would be unnecessary to provide complainants a "reasonable period of time" in which to file a complaint, in light of the simplified procedures set forth below.

335. The statute provides one limited exception to the requirements that complaints may be filed only against a rate increase, and then only within a "reasonable period of time" following the rate increase. This exception concerns the filing of complaints regarding existing cable programming service and associated equipment rates as of the effective date of our rules. Section 623(c)(3) affords complainants 180 days following the

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[819] Several commenters in this docket urge us to require cable operators to notify franchising authorities and subscribers in advance of any cable programming service rate increase. See Austin Comments at 67; CFA Comments at 146-47; NATOA Comments at 77. As noted above, in addressing consumer protection and customer service issues in MM Docket No. 92-263, we recently adopted a requirement that cable operators notify subscribers of any changes in rates, programming or channel positions as soon as possible through announcements on the cable system and in writing. If the change is within the control of the cable operator, notice must be given to subscribers a minimum of 30 days in advance of any such changes. See Customer Service Order, supra n. 818, at 35-36 and Appendix B, Section 76.309(c)(3)(i)(B). Since franchising authorities, like subscribers, may file cable programming service rate complaints pursuant to Section 623(c)(1)(B), we will adopt a similar requirement that cable operators give a minimum of 30 days advance written notice to the franchising authority of any changes in rates for cable programming service. In circumstances where the proposed rate increase meets our reasonable rate standards, the notification requirements also will give cable operators an opportunity to explain to subscribers and the franchising authority that the proposed rate comports with the Commission's regulations and, therefore, is entitled to a presumption of reasonableness. This may reduce significantly the number of complaints filed as a result of the rate change, thereby alleviating burdens on subscribers, cable operators and the Commission.

[820] See CFA Comments at 143-44; MCATC Comments at 46-47.

effective date of our rules to challenge existing rates for cable programming service and associated equipment. Complainants thus may file against cable programming service and associated equipment rates existing as of the effective date of our rules for a 180 day period, without regard to our general 45-day limitation period. Once this initial 180-day period passes, however, Section 623(c)(3) bars complaints challenging the reasonableness of cable programming service and associated equipment rates existing as of the effective date of our rules.[821] Thereafter, complaints may be filed only if a cable operator subsequently raises its rate, and such complaints will be subject to the 45-day limitation period described above. Late-filed complaints will be dismissed with prejudice, i.e., without an opportunity to refile. We intend strictly to observe this statutory limitation period.

336. Minimum Showing. Section 623(c)(1)(C) directs the Commission to adopt procedures that specify the minimum showing that shall be required for a complaint to obtain Commission consideration and resolution. The Notice proposed two alternative approaches to implement this requirement. The first would require complainants to state concisely facts showing how an operator has violated our rate regulations. Defective complaints would not be dismissed initially; complainants would receive an informational letter and be given an opportunity to refile. The second proposal would require a less rigorous showing by the complainant. Under this approach, the complainant would be required to supply certain readily available factual information and allege that cable rates have risen unreasonably within a given period. Complaints failing to satisfy this more lenient minimum showing standard would be dismissed.[822]

337. Comments on these proposals were mixed. Several commenters appear generally to support the first approach whereby a complainant who fails to demonstrate why the rate in question violates the Commission's rules would receive an informational letter with an opportunity to refile.[823] CFA, however, strongly objects to this approach. It argues that such a requirement places too great a burden on subscribers and effectively forces them to plead a prima facie case, a standard

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[821] See Blade Comments at 12 (challenges to existing tier rates are cut off after 180 days from effective date of rules).

[822] Notice, 8 FCC Rcd at 532, paras. 99-100.

[823] See NATOA Comments at 77-78 (complaint adequate if it shows rate charged by cable operator exceeds benchmark or price cap); Austin Comments at 64-65 (complaint must merely state that the rate exceeds the FCC-prescribed price per channel); Conn. Comments at 14.

that Congress clearly rejected.[824] CFA endorses the second proposal outlined in the Notice as more consistent with Congress's intent.[825] In contrast, several cable operators object to the second proposal. These commenters argue that complaints must contain more than a mere allegation that rates have risen unreasonably in order to deter frivolous filings.[826]

338. We adopt an approach that combines elements of both proposals described in the Notice. Specifically, in order to make the "minimum showing" mentioned in the statute, we shall require the complainant to supply certain readily available factual information that we consider necessary to adjudicate any complaint. This information must be provided on a standard complaint form, which we discuss in more detail below. In addition, the complainant must allege simply that a rate for cable programming service or associated equipment charged by the cable operator is unreasonable because it violates the Commission's rate regulations.[827] The complainant will not, however, be required to provide the underlying information and calculations necessary to judge the particular rate against the Commission's rate standards. As we observed in the Notice, and as certain commenters confirm, our reasonable rate formulas may not be readily accessible to the ordinary subscriber who desires to file a complaint nor may the subscriber possess the necessary information to calculate the reasonable rate for the system in question.[828]

339. The "minimum showing" standard we adopt is consistent with Congress's decision to avoid a prima facie case pleading requirement and is not "so technical or complicated as to require subscribers to retain the services of a lawyer to file a complaint and obtain Commission consideration of the

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[824] CFA Comments at 139; CFA Reply at 73. See also Commerce Comments at 3 (typical subscriber may not have the where-with-all to participate in such a stringent and proscribed process).

[825] CFA Comments at 139. See also Commerce Comments at 3.

[826] See Falcon Comments at 65-66; Nashoba Comments at 106; Newhouse Comments at 43-44.

[827] See Communications Act, § 623(c)(1)(B), 47 U.S.C. § 543(c)(1)(B) (complaint should allege "that a rate for cable programming services charged by a cable operator violates the criteria prescribed [by the FCC to identify unreasonable rates]").

[828] See Notice, 8 FCC Rcd at 532, para. 99. See generally CFA Comments at 139; Commerce Comments at 3.

reasonableness of the rate in question."[829] Complaints that fail initially to meet the minimum showing requirement described above will be dismissed without prejudice. In this circumstance, the complainant will be given one additional opportunity to file a corrected complaint. The Commission will send the complainant a blank copy of the standard complaint form and instructions for filling out the form. In addition, the complainant will receive an informational letter describing why the original complaint was defective and outlining the complainant's right to refile the complaint.[830] For a complaint filed on the standard form but which is otherwise defective, the complainant will have an additional 30 days from the date of the Commission's notice to file a corrected complaint.[831] If the corrected complaint fails for a second time to meet the minimum showing described above, the Commission will dismiss it with prejudice and will notify the complainant and the cable operator accordingly.[832]

340. Standard Complaint Form. The Notice sought comment on specific forms or language that might be standardized

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[829] Conference Report at 64.

[830] The Commission concurrently will notify the cable operator that the original complaint fails to meet the minimum showing and that the complainant will be afforded a single opportunity to refile within 30 days. Such notification will relieve the cable operator of its obligation to respond unless and until the complainant files a corrected complaint with the Commission and serves the corrected complaint on the cable operator.

[831] The filing of an original complaint on the standard complaint form but which is otherwise defective, will toll the limitation period regarding the filing of complaints. In such circumstances, however, should the complainant fail to file a corrected complaint within the additional 30 day period described above, the complainant's opportunity to file a valid complaint will be extinguished. As with late-filed original complaints, corrected complaints received after the supplemental 30 day period has expired will be dismissed with prejudice, i.e., without an opportunity to refile. An attempt to file an original complaint without using the standard complaint form will not toll the applicable limitation period.

[832] We will apply the same minimum showing requirement to all complaints. There is no record support for holding complaints filed by franchising authorities or parties represented by counsel to a different standard, and we perceive no public interest benefits in such a dichotomy. See NATOA Comments at 77-78; USTA Comments at 18.

for use by subscribers in filing rate-related complaints.[833] The idea of a standardized form enjoyed wide support in the comments, with several parties offering specific suggestions as to the content of such a form.[834] Because we believe a simple standardized form will serve to aid complainants in filing complaints and will specify the minimum factual information necessary to avoid dismissal, we will require complainants to obtain and file with the Commission a standard complaint form. A copy of this form is attached to this order as an appendix.[835] We intend to make this form widely available upon request not only from the Commission, but also from franchising authorities and cable operators.[836]

341. Complainants will be required to provide the following factual information on the form:

(1) the complainant's name, mailing address and daytime telephone number;

(2) the name, mailing address, and FCC community unit identifier of the cable operator charging the disputed rate;[837]

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[833] Notice, 8 FCC Rcd at 532, para. 101.

[834] See, e.g., Austin Comments at 68; CFA Comments at 140; Cole Comments at 43; MCATC Comments at 44-45; USTA Comments at 18.

[835] The standard complaint form must be used by any person seeking to file a cable programming service rate complaint with the Commission. This includes subscribers, franchising authorities, or other relevant state or local government entities. See Communications Act, § 623(c)(1)(B), 47 U.S.C. § 623(c)(1)(B). As noted above, should a complainant fail to utilize this form, the Commission will dismiss the complaint without prejudice. The complainant may attempt to file a new complaint on the standard form, but will remain subject to the applicable limitation period discussed at paras. 333-335, supra. See para. 339 and n. 831, supra.

[836] See Notice, 8 FCC Rcd at 532, para. 101; CFA at Comments 147 (forms should be available from the local franchising authority, the Commission, and the offices of the local cable operator); Austin Comments at 68. We will require cable operators to furnish subscribers with a copy of the standard complaint form upon request.

[837] The FCC community unit identifier is a code generated by the Commission for administrative purposes and is assigned to a cable television system upon registration with the Commission. The community unit identifier is unique to each individual cable system

(3) the name and address of the relevant franchising authority;[838]

(4) an indication whether the complainant is challenging the reasonableness of an existing rate for cable programming service or associated equipment as of the effective date of our rules, or a rate increase;

(5) for subscriber complaints challenging the reasonableness of a rate increase, the date the complainant first received a bill reflecting the increased rate;

(6) a description of the cable programming service or associated equipment involved and, if applicable, how service or equipment has changed;

(7) the current rate for the cable programming service or associated equipment at issue, and, if applicable, the most recent rate for the service or equipment in effect immediately prior to the rate increase;

(8) an indication whether the complainant is filing a complaint regarding this specific rate for the first time, or is filing a corrected complaint regarding this specific rate to cure a defect in a prior complaint that was dismissed without prejudice;

(9) if the complainant is filing a corrected complaint, an indication of the date the complainant filed the prior complaint and the date the complainant received notification from the Commission that the prior complaint was defective;

(10) a certification that a copy of the complaint, including all attachments, is being served contemporaneously via first class mail on the cable operator and, if the complainant is a subscriber, on the local franchising authority;

(11) an allegation that the rate in question is unreasonable because it violates the Commission's rate regulations; and

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that operates within a separate and distinct community or municipal entity. Since subscribers do not normally have access to this information, we will require cable operators to provide the FCC community unit identifier on monthly subscriber bills.

[838] If the franchising authority is the complainant, this section will be left blank. As with the FCC community unit identifier, we will require the cable operator to provide this information on monthly subscriber bills.

(12) a certification that, to the best of the complainant's knowledge, the information provided on the form is true and correct.

Finally, the complainant must attach to the standard complaint form a copy of the most recent bill reflecting the disputed rate or rate increase.

342. We believe this information is readily accessible to the complainant and essential to processing a complaint. As mentioned above, failure to provide this information initially will result in dismissal of the complaint without prejudice. In such circumstances, if the complainant does not file a corrected complaint containing all requisite information within 30 days of notification of a deficiency, the complaint will be dismissed with prejudice for failure to provide the "minimum showing" referred to by the statute.

343. Service Requirements. As proposed in the Notice,[839] complainants will be required to serve a copy of the complaint on the cable operator. In addition, a complaining subscriber will be required to serve a copy of the complaint on the relevant franchising authority. This may be accomplished simply by mailing a copy of the complaint form via first class mail to the cable operator and franchising authority. Service must be accomplished at the same time the complainant files the complaint with the Commission. The service requirement will facilitate and expedite the complaint process by promptly informing the cable operator, and, in appropriate circumstances, the franchising authority, that a complaint has been filed with the Commission. With such contemporaneous notice, a cable operator will be prepared expeditiously to provide the Commission with any needed information and to respond formally to the complaint in a timely fashion. As noted above, the complainant will be required to certify on the standard complaint form that service is being accomplished contemporaneously with the filing of the complaint.

344. While a service requirement is supported by municipalities and cable operators alike,[840] CFA contends that it would serve as a barrier to subscribers wishing to file complaints at the Commission.[841] We believe that the burden involved in simply mailing copies of the complaint via first

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[839] 8 FCC Rcd at 532, para. 103.

[840] See Cole Comments at 43; Cox Comments at 72-73; NCTA Comments at 75; NewBedford Comments at 5; Sommerville Comments at 5; Thousand Oaks Comments at 27-28.

[841] CFA Comments at 142.

-lass mail to two entities is slight. On the other hand, the benefits of contemporaneous notice to the cable operator and the franchising authority in facilitating and expediting the complaint process are plain. On balance, we believe the service requirement will advance the complaint process without unduly burdening the complainant.

345. We will not, however, adopt the suggestion of some cable operators that complainants first serve the complaint on the cable operator and obtain an informal response by that operator, prior to filing their complaint with the Commission.[842] This would complicate the process for subscribers and, unlike a simple contemporaneous service requirement, would delay Commission consideration of a subscriber's complaint. It is possible, as some cable operators suggest, that serving the cable operator first may result in informal settlements and reduce complaints filed with the Commission. This possible benefit, when measured against the burden on subscribers, the potential for delay, and Congress's clear intent that subscribers be permitted to file complaints with the Commission pursuant to simple and expeditious procedures, does not persuade us to adopt this additional step. Hence, we will not adopt such an advance notice requirement.

346. Role of Franchising Authorities. The Notice asked whether a subscriber should be permitted, or required, to obtain a franchising authority's decision or concurrence as a precondition to the filing of a complaint with the Commission.[843] This question generated widely divergent comments from municipalities, cable operators and consumer/public interest advocates. The majority of municipalities favor this approach. Many of them urge the Commission to go beyond the possible role discussed in the Notice, which in essence contemplated the franchising authority as providing informal assistance to subscribers and the Commission. Instead, they propose that the Commission provide that in the first instance the local franchising authority shall formally review and adjudicate complaints regarding cable programming service and enforce their decisions, with an appeal process at the Commission.[844] These

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[842] See CATA Comments at 33-34; Cole Comments at 43; see also NCC Comments at 27-28.

[843] Notice, 8 FCC Rcd at 532, para. 102.

[844] See, e.g., Commerce Comments at 3; Dover Comments at 25; Minn. Comments at 22; NATOA Comments at 72-73; Thousand Oaks Comments at 26-27; Baltimore Reply at 15; Dade Reply at 4; Dearborn Reply at 2; Garden City Reply at 2; Hays Reply at 3; Hollywood Reply at 6; Iowa City Reply at 5; Madison Reply at 3; Mankato Reply at 3; Marshall Reply at 2; Mentor Reply at 3; Multnomah Reply at 3;

commenters believe such an approach would have the primary benefit of relieving administrative burdens on the Commission. Other asserted benefits include furthering the franchising authority's role as a responsible party in the process and providing a fuller record on which to base a Commission decision.

347. In contrast, several cable operators vigorously oppose participation by the franchising authority and specifically argue that the Cable Act provides no power to the Commission to delegate adjudicatory functions concerning cable programming service complaints to local franchising authorities.[845] CFA believes the proposal in the Notice regarding participation by the local franchising authority conflicts with Congress's intent.[846] Similarly, USTA believes that participation by the franchising authority is more than Congress anticipated and would unreasonably burden both the franchising entity and the complaining subscriber.[847] Several municipalities also believe that Congress did not intend such a precondition and that complaints should be filed directly with the Commission.[848]

348. We will not require subscribers to obtain a franchising authority's concurrence or decision before filing a complaint with the Commission. In our view, such a requirement

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San Antonio Reply at 3. See also Cox Comments at 70, 72-73 (cable operator); SSO Reply Comments at 8-9 (cable operators); West Virginia Reply at 4-5 (state government) (supporting permissive delegation of FCC authority with consent of subscriber); MCATC Comments at 44-45 (franchising authority collects complaints from subscribers, reviews them and provides additional comments, and forwards complaints to FCC).

[845] See Comcast Reply at 12; NCTA Reply at 68-69; Time Warner Reply at 42. See also CATA Comments at 32-33 (apart from dubious legality of requiring franchising authority's concurrence, in many cases there will be no regulatory body to complain to; even where a local authority exists, its expertise is limited to regulation of a system's basic tier rates and nothing more).

[846] CFA argues that the statute and its legislative history place subscribers on an equal footing with franchising authorities and other relevant state and local governmental authorities in terms of the ability to file a complaint directly with the Commission. CFA Comments at 141-42.

[847] USTA Comments at 19.

[848] See Fairfax Comments at 21; Miami Comments at 18; Austin Comments at 68. See also Conn. Comments at 14; NYConsumer Comments at 13.

would not serve Congress's objective of establishing simple, fair and expeditious complaint procedures. To the contrary, it would complicate the filing process for the consumer and delay Commission consideration of a subscriber's complaint. Such a process would require the subscriber to file the complaint with the franchising authority; await action by the franchising authority during a specified time period; and then, if still unsatisfied, file the complaint with the Commission, attaching the franchising authority's decision or a summary of the franchising authority's disposition of the complaint. Because we conclude that such a process would not serve the goals of the statute, we will not require a subscriber to obtain the decision or concurrence of the franchising authority as a precondition to filing a complaint at the Commission.[849]

349. We agree with the many commenters, however, who believe that franchising authorities may offer constructive assistance to subscribers wishing to file complaints regarding cable programming service rates and to the Commission in resolving such complaints. A franchising authority may provide inquiring subscribers with the complaint form described above and may aid subscribers in filling out the form and formulating the complaint. This could involve, for example, attaching to the subscriber's complaint a statement from the franchising authority expressing its views on the reasonableness of the rate in question. Since the franchise authority has a uniquely informed perspective on its local cable operator and the needs of subscribers within the franchise area, its participation in the process is desirable and its views are of considerable interest to the Commission. Moreover, coordination by the local franchising authority of multiple subscriber complaints following a rate increase may help focus the issues and assist the Commission in resolving the situation. Therefore, we will encourage -- but not require -- subscribers who wish to file a complaint with the Commission to coordinate their efforts with the relevant franchising authority. Since subscribers will not be required to consult with the franchising authority, however, we see no need at this time to extend the filing period described above.

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[849] MCATC suggests that an initial review by the franchising authority would not conflict with the statute because the local authority would have no discretion to withhold filing a complaint with the FCC if the subscriber is not satisfied with local resolution. MCATC Comments at 44-45. We agree that, as a legal matter, we could require subscribers to obtain the informal views of the local franchising authority as a precondition to filing the complaint with the Commission. As a policy matter, however, as noted above, we believe such a requirement would be inconsistent with the statutory goals of simplicity, fairness and expedition.

350. Finally, we conclude that we are not free to adopt the broader approach advanced by some municipalities that local franchising authorities, as opposed to the FCC, formally review and adjudicate cable programming service complaints and enforce these decisions in the first instance. In contrast to the statutory provisions governing regulation of basic service tier rates, which explicitly provide for formal review and enforcement by local franchising authorities in certain circumstances,[850] the statute does not provide a formal role for franchising authorities with respect to cable programming service complaints. Moreover, as cable operators observe, absent specific authority to delegate our adjudicatory and enforcement powers we are unable to delegate such powers to the local franchising authorities in the cable programming context. See Planned Parenthood Federation of America, Inc. v. Heckler, 712 F.2d 650, 663 (D.C. Cir. 1983) ("In the absence of Congress' express authorization to HHS to in turn empower the state to set eligibility criteria, the Secretary has no power to do so.").[851]

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[850] See Communications Act, § 623(a), (b)(5), 47 U.S.C. § 543(a), (b)(5).

[851] See also Comcast Reply at 12; NCTA Reply at 68-69; Time Warner Reply at 42. NATOA asserts that nothing in Section 623 of the Cable Act or its legislative history prohibits the delegation of authority to local franchising authorities. This assertion falls short of demonstrating express delegation authority as required under the Planned Parenthood decision, and NATOA offers no suggestion that Congress intended such a delegation. West Virginia believes that there is precedent for a delegation from the FCC to local franchising authorities, citing the Commission's practice of processing employment discrimination complaints. West Virginia notes that, pursuant to a Memorandum of Understanding between the FCC and the Equal Employment Opportunity Commission ("EEOC"), if the FCC receives a complaint which falls both within its own jurisdiction and the jurisdiction of the EEOC or a state employment discrimination agency, the FCC may refer the matter to the EEOC or the applicable state agency. The employment discrimination model is clearly distinguishable, however. First, with respect to referral to the EEOC, referral to another federal agency with concurrent jurisdiction is different from delegation to a local government. With respect to referral to state agencies, the EEOC's organic statute not only recognizes a dual state/federal regulatory scheme for employment discrimination complaints, it actually requires complainants to file a complaint initially with an authorized state agency prior to filing with the EEOC. See 42 U.S.C. § 2000e-5(c). As noted above, the Cable Act provides no formal role for local authorities in the cable programming service complaint context, nor is there any evidence that Congress intended such a result. We thus conclude that we are unable to delegate formal adjudicatory and enforcement powers to local franchising

351. Initial Review of the Complaint and Cable Operator Response. Upon receipt of a complaint, the Commission must determine whether it meets the minimum showing necessary to permit the complaint to go forward. The Notice sought comment on two possible approaches in this regard.[852] The first would require the cable operator to respond to all complaints, and the Commission would consider both the complaint and the response in deciding whether a complaint should go forward. If the Commission determined that a minimum showing had been made, the burden would be on the cable operator to disprove the allegation of unreasonable rates in a supplemental response. Under the second proposed approach, the Commission would consider only the complaint itself in deciding whether the complaint meets the minimum showing requirement to permit it to go forward. Under this approach, cable operators would only be required to respond to those complaints the Commission determines present a valid claim.

352. These proposals generated a mixed record. Municipalities generally seem to favor the first proposal discussed in the Notice.[853] Cable operators, in contrast, seek a process that requires them to respond only to those complaints that the Commission initially has reviewed and found to have merit. In this regard, they believe operators should not have to respond to complaints regarding rates that fall below a presumptively reasonable level.[854] CFA also advocates an initial review by the Commission regarding the minimum showing standard, in order to avoid cable operators having to respond to frivolous complaints or to make separate responses to separate complaints that make identical claims. CFA does not, however, support an approach that would require cable operators to respond only to those complaints that specify a rate which exceeds the presumptively reasonable level.[855]

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authorities with respect to cable programming service rates.

[852] Notice, 8 FCC Rcd at 532-33, paras. 103-104.

[853] See, e.g., NewBedford Comments at 5; Sommerville Comments at 5; Thousand Oaks Comments at 27-28.

[854] See, e.g., Cablevision Comments at 53; Cole Comments at 43-44; Cox Comments at 72-73; NCTA Comments at 69. But see CATA Comments at 33 (expressing discomfort over a complaint process without initial involvement by the cable system).

[855] CFA Comments at 142-143. CFA believes that if operators are granted the ability to prove the reasonableness of rates above the presumptively reasonable level, subscribers should have an equal opportunity to prove that rates below that level are unreasonable. CFA Comments at 143 n.150.

353. After review of the record, we adopt a process that is a hybrid of the proposals discussed in the Notice. We have already described the minimum showing standard necessary for a complaint to obtain Commission consideration and resolution of whether the rate in question is unreasonable. In addition to requiring certain factual information, this standard requires a complainant to allege simply that the rate at issue is unreasonable because it violates the Commission's rate regulations. Because subscribers may not possess the information necessary to compute the reasonable rate for the system in question, the minimum showing standard does not require the complainant to make this computation. Indeed, it is quite possible that the Commission may not possess this information when the complaint is filed. Therefore, we must establish a process that produces information required to make the reasonable rate calculation, and, in certain circumstances, facilitates a cost-based review of rates.

354. Accordingly, upon receipt of a complaint, we shall review it to determine if it meets the minimum showing, described above, to permit the complaint to go forward. Because it is likely that necessary information will not be available at this early stage, the reasonable rate calculation will not be included in this review. As noted above, if the complaint does not satisfy the minimum showing threshold, we shall dismiss it without prejudice and notify all parties. Corrected complaints submitted pursuant to the 30 day supplemental filing period that do not satisfy the minimum showing requirement will be dismissed with prejudice and the Commission will notify the parties. In any event, a cable operator is not obliged to respond to any complaint -- whether initial or corrected -- that the Commission has determined is defective and has notified the parties accordingly.

355. Absent a Commission notification that the complaint fails to satisfy the minimum showing requirement, however, the cable operator must respond.[856] The cable operator

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[856] We recognize that there may be instances in which a local franchising authority has not yet asserted jurisdiction over basic cable rates at the time we receive a complaint from a subscriber about the rates for cable programming service. As noted previously, we generally intend to use the certification process triggered by local governments seeking to regulate basic rates to resolve questions concerning the presence or absence of effective competition. However, if the effective competition issue has not been resolved by the time we receive a cable programming service complaint, the cable operator may raise it as a defense in its response to the complaint. The burden will be on the operator to demonstrate that it faces effective competition in the franchise area.

shall provide its response on a standard form. The standard response form, which is attached as an appendix to this order, must be used to respond both to complaints involving cable programming service rates and charges for installation or rental of associated equipment. Because the cable operator uniquely possesses information necessary to perform the reasonable rate calculation and other cost data that may bear on our evaluation of service or equipment rates, the burden shall be on the cable operator to prove that the rate in question is not unreasonable.[857] It may do so in several different ways. For a complaint involving a service rate at or below the permitted level, the cable operator may simply provide information and calculations on the standard response form that demonstrate that the rate in question falls at or below the permitted level. In this case, a strong presumption of reasonableness attaches. For a complaint involving a service rate that exceeds the permitted level, the cable operator may choose simply to respond by reducing the rate charged to a level at or below the permitted level and by providing proof that it has done so.[858] Alternatively, the cable operator may provide detailed cost-based information that demonstrates that the rate in question, when considered in light of the specific factual circumstances, is reasonable despite the fact that it exceeds the permitted rate level.[859] Finally, for a complaint involving a charge for

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[857] The record generally supports this requirement. See, e.g., Austin Comments at 14, 65; Carbondale Comments at 7; CFA Comments at 140; NATOA Comments at 74; NewBedford Comments at 5; Minn. Comments at 23; Parsippany Comments at 12; Sommerville Comments at 5; USTA Comments at 19. Some cable operators, however, oppose shifting the burden to the operator after a minimum showing; these commenters believe the burden should shift only after the complainant shows the rate is above the presumptively reasonable level. See Cox Comments at 75; CIC Comments at 78; Falcon Comments at 65-66; Nashoba Comments at 108; NCTA Reply at 69. We will not adopt this approach. As discussed above, complainants likely will not have access to the requisite information to make such a showing. Since cable operators, in contrast, do possess this information, we find it is appropriate and essential to place the burden initially on the cable operator to produce data and prove that its rate is not unreasonable.

[858] In such circumstances, we will review the reduced rate to ensure that the rate for the service complies with our reasonableness standard.

[859] During the pendency of our further rulemaking in this docket designed to craft specific cost-of-service criteria, we will analyze a cable operator's showing under general cost-of-service regulatory principles. For complaints filed after we conclude the supplemental rulemaking proceeding and adopt more specific cost-of-

equipment installation or rental, the cable operator must respond by providing information on the standard response form that demonstrates that the charge is based on the cable operator's actual cost.

356. A cable operator must file its response with the Commission within 30 days from the date of service of the complaint,[860] unless the Commission notifies the operator during the 30-day period that the complaint fails to satisfy the minimum showing requirement.[861] The cable operator's response must indicate when service occurred. In the event there are multiple complaints regarding the identical rate increase, the cable operator may file a consolidated response to all complaints.[862] The cable operator shall serve its response on the complainant and the local franchising authority via first class mail. In keeping with Congress's intent to establish expeditious procedures that are simple and do not require complainants to

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service criteria, we will analyze a cable operator's cost-of-service showing under those criteria.

[860] Pursuant to our rules, service by mail is complete upon mailing. 47 C.F.R. § 1.47(f) (1992). Thus, if the complainant serves the cable operator at the same time he or she sends the complaint to the Commission, the cable operator must submit its response no later than 30 days from the date of the complaint.

[861] In the event a cable operator believes a particular complaint does not meet the minimum showing requirement, but has not received notification from the Commission that the complaint is defective within the 30-day filing time period, the cable operator must respond to the merits of the complaint no later than the 30th day after service of the complaint. In addition to its response on the merits, the cable operator also may include a motion to dismiss stating with particularity the reasons the cable operator thinks the complaint is procedurally defective.

[862] Outside the initial 180 day period for filing complaints regarding rates in existence at the time our rules take effect, complaints concerning cable programming service will be triggered by an event initiated by the cable operator, such as a rate increase or a change in the number of channels provided on a particular tier. To the extent that such an event elicits multiple complaints concerning the same operator and the identical service, we would resolve them in a consolidated proceeding. Unless notified by the Commission to the contrary, a cable operator's consolidated response will be due within 30 days of service of the first complaint filed. The cable operator will be permitted to amend its consolidated response to address any new issues raised by complaints received after the filing of the cable operator's initial response.

retain an attorney, our rules will not provide for a reply by the complainant.[863] Any cable operator failing to file and serve a response to a valid complaint may be deemed in default. In such circumstances, an order may be entered against the cable operator finding the rate in question to be unreasonable and mandating appropriate relief.

357. Decision on the Merits. We delegate authority to the staff to adjudicate cable programming service complaints and order appropriate relief. The staff will consider the complaint and the cable operator's response and then make its ruling by written decision. If the staff finds that the rate is unreasonable, it shall grant the complaint and order appropriate relief, including prospective rate reductions and refunds as described below.[864] If the staff finds that the rate in question is not unreasonable, it shall deny the complaint.

358. Administrative Appeals and Judicial Review. As with any staff-level decision, a party may petition the staff to reconsider its decision or may seek review of the staff's decision by the full Commission. Existing procedures governing reconsideration and review will apply to decisions granting or denying a complaint.[865] Final Commission decisions, of course, are subject to judicial review.[866]

359. Ex parte Presentations. The Notice sought comment on the appropriate treatment of ex parte presentations during the complaint process.[867] In particular, the Notice asked

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[863] See Communications Act, § 623(c)(1)(C), 47 U.S.C. § 543(c)(1)(C); Conference Report at 64.

[864] If the cable operator fails in its response to provide data and information sufficient to make the necessary reasonable rate calculation, or data and information necessary to conduct a cost-of-service analysis or evaluate the cable operator's actual equipment cost, the cable operator shall not have carried its burden to demonstrate that the rate in question is reasonable. In such circumstances, the staff may grant the complaint and order appropriate relief.

[865] See 47 C.F.R. §§ 1.106, 1.115 (1992).

[866] 47 U.S.C. § 402(a); 28 U.S.C. § 2344.

[867] An "ex parte presentation" is defined in our rules as follows:

> Any presentation made to decision-making personnel but, in restricted proceedings, any presentation to or from decision-making personnel, which:

if we should adopt relaxed (i.e., "permit but disclose") ex parte rules in order to facilitate staff resolution of a dispute.[868] Several municipalities object to this approach. They assert that as a matter of fairness no ex parte contacts should be allowed because many franchising authorities and subscribers, unlike cable operators, may not have the benefit of legal representation in the District of Columbia. These parties believe that all communications between the Commission and a party, including requests for comments or information, should be done by mail and served on all parties.[869]

360. We are persuaded that our proposal to apply relaxed ex parte rules to cable programming service complaints might disadvantage complainants, especially subscribers and small franchising authorities, who do not have the benefit of counsel in Washington, D.C. "Permit but disclose" procedures might unintentionally place cable operators, who typically retain counsel to represent them before the Commission and monitor ongoing FCC proceedings, in a more favorable position than complainants who do not have the benefit of such representation. Thus, such procedures might not be consistent with congressional intent that we establish "fair and expeditious" procedures[870] that do not require complainants "to retain the services of a lawyer... ."[871] Therefore, we will not adopt this approach.

361. Rather, we shall apply our existing ex parte rules concerning adjudicative proceedings. Cable programming service rate complaints, which all "involve[ ] the determination of rights and responsibilities of specific parties," are

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(1) If written, is not served on the parties to the proceeding, or

(2) If oral, is made without advance notice to the parties to the proceedings and without opportunity for them to be present.

47 C.F.R. § 1.1202(b) (1992) (emphasis in original).

[868] Notice, 8 FCC Rcd at 534, para. 109.

[869] See Miami Comments at 20; Monroe Comments at 8. Two cable operators support application of relaxed ex parte rules until the Commission determines that a material fact is in dispute and formal hearing procedures are therefore necessary. Cox at Comments 74; CIC Comments at 76-77.

[870] Cable Act, § 623(c)(1)(B), 47 U.S.C. § 543(c)(1)(B).

[871] Conference Report at 64.

adjudicative proceedings under our rules.[872] Such adjudicative proceedings are classified as "restricted proceedings" for ex parte purposes from the date of filing of a formal opposition or a formal complaint.[873] We believe cable programming service rate complaints are best categorized as informal complaints.[874] Accordingly, these proceedings will become restricted once a formal opposition is filed by the cable operator. From that point forward, as with all restricted adjudications, ex parte presentations will be prohibited.[875]

362. We note that our existing rules exempt from this general prohibition any presentation "requested by the Commission or staff for the clarification or adduction of evidence or for resolution of issues, [if] the proceeding is a restricted proceeding which has not been designated for hearing... ."[876] This exemption provides the staff flexibility to contact any party to request additional information necessary to resolve the complaint. At the same time, because the response to any such inquiries must be served on the other parties, no other parties are placed at a disadvantage.[877]

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[872] 47 C.F.R. § 1.1202(d) (1992).

[873] 47 C.F.R. § 1.1208(c)(1)(i)(B), (ii)(A) (1992). See also 47 C.F.R. § 1.1202(e) (1992) (defining "formal opposition or formal complaint").

[874] Congress's express rejection of a prima facie case pleading requirement appears to indicate a desire for some degree of informality in the complaint process. See Conference Report at 64.

[875] 47 C.F.R. § 1.1208(a) (1992). We note that a cable operator intending to file a formal opposition may not make any ex parte presentations before doing so; nor may a cable operator that chooses to file an informal opposition make any oral ex parte presentations. See 47 C.F.R. §§ 1.1204(a)(2)(ii) Note; 1.1208(b)(2) (1992).

[876] 47 C.F.R. § 1.1204(b)(7) (1992).

[877] The rule requires that "any new written information elicited from such a request and a summary of any new oral information shall be served by the person making the presentation upon the other parties to the proceeding." 47 C.F.R. § 1.1204 Note (1992). Thus, for instance, if the staff contacted a cable operator to obtain additional information to resolve the dispute, the cable operator would be required to serve on the complainant any new information not already reflected in the record. This service requirement ensures that the complainant will be fully apprised of any new information provided to the Commission by the cable operator resulting from communications initiated by the Commission or the

363. We recognize that a potential exists for the filing of hundreds or even thousands of complaints relating to a single cable system's rates. Such complaints are likely to come from subscribers who are unrepresented by counsel and it may not be immediately evident how much consolidation of these complaints is going to take place. In these circumstances literal compliance with the ex parte rules, i.e., the requirement that each complainant be served with each pleading or decision document, may become extremely burdensome for the system operator, the Commission and the complainants. In such circumstances, it may be necessary for the Commission or the staff to apply special procedures.

364. Proprietary Information. The Notice sought comment on how to treat information necessary to adjudicate a cable programming service rate complaint, but which the cable operator regards as proprietary. In particular, the Notice asked if our existing rules governing confidential business information are adequate and sufficiently flexible in the context of cable programming service rate disputes. We also invited comment on procedures that would provide parties to complaints limited access to proprietary information, and we asked commenters to identify specific types of information that likely would be considered proprietary by cable operators.[878] These questions generated a relatively meager record. The few cable operators who commented on this issue assert generally that protection for proprietary material must be provided,[879] although only one operator identified any specific information it deems proprietary.[880] Municipalities and consumer/public interest advocates generally believe that the Commission should provide for the fullest possible disclosure of information necessary to resolve a complaint and generally believe the Commission's existing rules are adequate.[881]

365. We will employ our existing rules and procedures regarding information submitted to the Commission in the cable programming service complaint process. Such information will be considered routinely available for public inspection absent a cable operator's request for confidential treatment pursuant to

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staff.

[878] Notice, 8 FCC Rcd at 533, para. 106.

[879] See Cole Comments at 44; Continental Reply at 26.

[880] Nationwide Comments at 3, 4 (subscriber numbers necessary for a finding on effective competition).

[881] See CFA Comments at 113; CFA Reply at 73-74; Austin Comments at 65; Miami Comments at 19; Fairfax Reply at 21.

Section 0.459 of the rules.[882] We will employ our existing requirement that places the burden on the person requesting confidential treatment to demonstrate by a preponderance of the evidence that nondisclosure is consistent with the provisions of the Freedom of Information Act ("FOIA").[883] Exemption 4 of the FOIA authorizes the Commission to withhold from public inspection, inter alia, confidential commercial or financial information.[884] We decline to adopt formal rules at this time regarding limited access for parties to information submitted by the cable operator that the Commission has determined to be confidential within the meaning of Exemption 4. Should this situation arise in a particular complaint, at least initially, we will consider offering parties such limited access.

366. Alternative Dispute Resolution. The Notice also sought comment on the possible use of alternative dispute resolution procedures by consenting parties.[885] One commenter

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[882] 47 C.F.R. § 0.459 (1992). Accordingly, we are amending Section 0.455 of the rules, 47 C.F.R. § 0.455 (1992), to add to the list of records with are routinely available for public inspection complaints against cable operators concerning cable programming service and equipment rates, where no request for confidentiality has been made.

[883] See 47 C.F.R. § 0.459(d) (1992). We reject the contention of two commenters that the burden should be placed on the complaining party to prove that disclosure would result in no competitive injury to the cable operator. See Cox Comments at 76; CIC Comments at 78-79. Not only would such a requirement be inconsistent with the FOIA, but the cable operator is in the best position to know the extent to which it faces competitive pressures in the marketplace and the potential for competitive injury if the information is disclosed. Therefore, we believe that, as provided under existing rules implementing the FOIA, the burden appropriately should be on the cable operator to demonstrate that disclosure will likely result in competitive harm.

[884] 5 U.S.C. § 552(b)(4). See 47 C.F.R. § 0.457(d) (1992) (Commission's rule implementing Exemption 4). Information is deemed "confidential" within the meaning of Exemption 4 if it satisfies certain judicially-approved criteria. See Critical Mass Energy Project v. NRC, 975 F.2d 871 (D.C. Cir. 1992) (en banc), cert. denied, 61 U.S.L.W. 3647 (U.S. Mar. 23, 1993) (No. 92-1043);National Parks and Conservation Ass'n v. Morton, 498 F.2d 765 (D.C. Cir. 1974). The Commission's rules also authorize public disclosure of such confidential information for "persuasive" reasons. See 47 C.F.R. §§ 0.547(d)(1); 0.461(f)(4) (1992).

[885] Notice, 8 FCC Rcd at 534, para. 109.

responded by advocating rate arbitration as a means to reduce administrative burdens on all parties.[886]

367. We have committed ourselves to use alternative dispute resolution techniques to expedite and improve our administrative process whenever feasible and consistent with our statutory mandate.[887] Parties wishing to employ alternative dispute resolution in the cable programming service context in lieu of adjudication of a complaint by the Commission may contact our staff. We will hold in abeyance any complaint in which the parties actively are exploring alternative dispute resolution in lieu of Commission adjudication.[888]

(2) Remedial and Enforcement Procedures for Rates Found to Be Unreasonable

i. Background

368. The Cable Act directs us to establish procedures to reduce rates for cable programming service that we have determined to be unreasonable, as well as procedures governing refunds to subscribers of the unreasonable portion of such rates paid after the filing of a complaint.[889] In the Notice, we invited comment on our tentative conclusion that the Cable Act, at a minimum, authorizes us prospectively to reduce unreasonable rates.[890] We also asked parties to comment on whether our

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[886] LeBoeuf Comments at 3-7.

[887] See Use of Alternative Dispute Resolution Procedures in Commission Proceedings and Proceedings in which the Commission is a Party, 6 FCC Rcd 5669 (1991).

[888] Persons seeking information regarding the use of alternative dispute resolution may contact the Commission's Designated ADR Specialist, ADR Program, Office of the General Counsel, Federal Communications Commission, 1919 M Street, N.W., Washington, D.C. 20554, Telephone (202) 632-6990, Telefax (202) 632-0149.

[889] Communications Act, § 623(c)(1)(C), 47 U.S.C. § 543(c)(1)(C).

[890] We use the term "prospective rate reduction" to refer to a rate decrease imposed after a finding of unreasonableness that is designed to prevent subscribers from continuing to bear the unreasonable portion of that rate in the future. A prospective rate reduction would not return unreasonable amounts paid by subscribers prior to the prospective rate reduction. These amounts would be addressed by means of a refund. We use the term "refund" to refer to a procedure which returns to subscribers unreasonable

authority under the Cable Act to order prospective rate reductions extends to prescription of specific rates. In addition, the Notice requested comment on our tentative conclusion that the Cable Act authorizes us to refund to subscribers that portion of such rates found to be unreasonable that subscribers paid after the filing of a complaint. The Notice also sought comment on the appropriate means to effect refunds, such as direct refunds to actual subscribers who paid the overage, or, alternatively, prospective percentage reductions in the unreasonable service rate to the class of subscribers that bore the unreasonable charge. Finally, the Notice sought comment on requiring a cable operator whose rates we have found to be unreasonable to certify that it has implemented all remedial measures outlined in our decision, such as rate reductions and/or refunds, with noncomplying operators subject to possible monetary forfeitures.[891]

ii. Comments

369. The comments, either explicitly or by implication, support our tentative conclusion that we may order prospective rate reductions for those cable programming service rates found to be unreasonable.[892] Further, two commenters suggest that the Commission may prescribe specific rates.[893] Certain cable operators take issue with our tentative conclusion that remedial relief should be implemented within 30 days of a Commission determination that the rate is unreasonable. They suggest, instead, a longer implementation period, such as 60 days, to better accommodate standard billing cycles.[894] Moreover, several cable operators contend that the operator

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amounts paid after the date a complaint was filed up to the point the cable operator implements a prospective rate reduction.

[891] Notice, 8 FCC Rcd at 533-34, paras. 107-108.

[892] See, e.g., Cole Comments at 44 (Commission should enforce its rate determinations by, inter alia, ordering prospective relief); Nashoba Comments at 108 (operator should have discretion to add additional services as an alternative to reducing rates); NATOA Comments at 75 (cable operators should have 30 days to reduce rates).

[893] CFA Comments at 145 & n.154; NATOA Comments at 75.

[894] Cox Comments at 79; CIC Comments at 82; Cole Comments at 44.

should have the discretion to add services as an alternative to reducing rates.[895]

370. With respect to our refund authority, the comments support the interpretation proposed in the Notice that Section 623(c)(1)(C) permits us to order refunds for the unreasonable portion of rates paid by subscribers after the date a complaint was filed.[896] Municipalities generally favor a requirement that cable operators issue refunds to actual subscribers who paid the overcharges.[897] CFA also prefers refunds to those subscribers actually overcharged, but suggests that, if this approach proves too burdensome, the Commission could require a reduction in rates to the entire class of current subscribers equal to the overcharges.[898] Cable operators ask us to recognize that refunds to the actual subscribers who paid the overages would be unreasonably burdensome and administratively infeasible. They overwhelmingly urge the Commission to adopt refund procedures that permit prospective compensatory rate reductions to the class of subscribers that paid the unreasonable rate.[899]

iii. Discussion

371. Prospective Rate Reductions. We affirm our tentative conclusion that Section 623(c)(1)(C) authorizes us prospectively to reduce an unreasonable rate for cable programming service in order to protect subscribers from continuing to bear that excessive rate in the future. Accordingly, upon a finding that a rate is unreasonable when judged against the criteria described above, we shall order the cable operator to reduce the rate to a specific reasonable level

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[895] Nashoba Comments at 108 (consistent with congressional policy to enhance diversity of programming); NCTA Comments at 77 (operator should be permitted to reconfigure its tiers to reach the benchmark level); Cole Comments at 44.

[896] See CFA Comments at 145 (Commission cannot order the refund of amounts paid prior to the date of the filing of a complaint); Blade Comments at 12 (refunds should be limited to period following filing of complaint); NCTA Comments at 76 (no authority in the Act for ordering refunds prior to the filing of a complaint); Cole Comments at 44; NATOA Comments at 75.

[897] See, e.g., Austin Comments at 66; NATOA Comments at 75-76.

[898] CFA Reply at 81-82; CFA Comments at 145-146.

[899] See Cole Comments at 44; Cox Comments at 80; CIC Comments at 82; Falcon Comments at 66-67; Nashoba Comments at 108-109; NCTA Comments at 77; TCI Comments at 60; Cablevision Reply at 54.

and to reflect the reduced rate in prospective bills to customers. Generally, the rate we specify as reasonable will be the permitted rate calculated pursuant to the formula described above. In individual circumstances where the cable operator provides cost-of-service data that demonstrate that a rate above the otherwise permitted level (but below the disputed rate) is reasonable and justified, we will specify a reasonable rate in excess of the permitted rate to effectuate the prospective rate reduction. Conversely, if the operator's cost-of-service showing indicates that a rate below the permitted rate is reasonable, we will designate that rate for purposes of implementing a prospective rate reduction. By rule, our decision requiring a prospective rate reduction shall remain binding on the cable operator for one year unless we designate a different time period in the order mandating the reduction or waive the one year requirement in individual circumstances.[900]

372. To the extent the Commission designates a specific, reasonable rate to be charged in the future, this in effect would be a rate prescription. We agree with several commenters that our authority pursuant to Section 623(c)(1)(C) to adopt "procedures to be used to reduce [unreasonable] rates for cable programming services" extends to the prescription of specific rates.[901] As CFA notes, absent the power to reduce rates to a specific level by prescribing a specific rate, our statutory refund authority under Section 623(c)(1)(C) would be null.[902] This is so because refunds to subscribers cannot be calculated without reference to a specific, reasonable rate for the cable programming service at issue.

373. Finally, we reject suggestions by some commenters that cable operators should be afforded discretion to increase service after a finding that its rates are unreasonable in lieu of reducing those rates.[903] These commenters have not demonstrated how such an approach would provide value equivalent to that of monetary rate reductions. In addition to the impracticability of evaluating the value of proposed added

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[900] In the event changed circumstances render continued applicability of the designated rate inappropriate during the full time period specified by the rule, a cable operator may seek waiver of the one year requirement pursuant to 47 C.F.R. § 1.3 (1992).

[901] See CFA Comments at 145; NATOA Comments at 75.

[902] CFA Comments at 145 n.154.

[903] See Nashoba Comments at 108; Cole Comments at 44; NCTA Comments at 77. CFA opposes permitting cable operators to add programming to reach a reasonable level. CFA Reply at 81-82.

services, such an approach would create unnecessary administrative difficulties.

374. Refunds. We shall also require the cable operator to refund overcharges to subscribers pursuant to Section 623(c)(1)(C) in order to make subscribers whole. The cumulative refund shall be calculated from the date a valid complaint was filed until the date the cable operator implements the reduced rate prospectively in bills to subscribers.[904] We agree with CFA and others that Section 623(c)(1)(C) does not contemplate refunds for rates paid prior to the date a complaint is filed with the Commission.[905] In most situations, the refund shall be equal to the difference between the disputed rate charged by the cable operator and the reasonable rate determined by the Commission. As noted above, the reasonable rate may be either the permitted rate calculated according to the Commission's formula or some higher or lower rate justified by a cable operator's cost of service showing.

375. We note one exception to this general approach to calculating refunds. As discussed previously, the statute affords complainants a 180 day period to challenge cable programming service rates existing as of the effective date of our rules.[906] Should a cable operator's existing rate go unchallenged during this 180 day period, Section 623(c)(3) bars complaints against that rate thereafter unless the cable operator subsequently raises its rate. Should we receive a complaint in these circumstances challenging a subsequent rate increase (and the operator's existing rate as of the effective date of our rules was not challenged), a question arises whether our remedial

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[904] In circumstances where an original complaint is dismissed without prejudice for failure to meet the minimum showing requirement discussed above, refund liability would accrue from the date the Commission receives a valid, revised complaint which makes the requisite minimum showing.

[905] See CFA Comments at 145; Blade Comments at 12; Cole Comments at 44; NCTA Comments at 76; NATOA Comments at 75. We cannot accept NJ's unsupported view that price rollbacks and refunds for unreasonable cable programming service rates should be effective December 5, 1992. NJ Comments at 21. The significance of this date for purposes of implementation of the rate regulation provisions of the Cable Act is not apparent. In any event, the Cable Act explicitly provides for refunds for unreasonable rates that were paid by subscribers "after the filing of [a] complaint," and complaints regarding existing rates or subsequent rate changes may be filed only after our rules take effect. Communications Act, § 623(c)(1)(C), (3), 47 U.S.C. § 543(c)(1)(C), (3).

[906] See Communications Act, § 623(c)(3), 47 U.S.C. § 543(c)(3).

measures may address the operator's entire rate or simply that component of the disputed rate that represents an increase above the operator's previous, unchallenged rate. The limitation of Section 623(c)(3) appears to preclude refund of any charges below the operator's rate in existence as of the effective date of our rules. Therefore, for purposes of calculating any refund, we will employ a modified approach in these circumstances in light of Section 623(c)(3). Thus, if we conclude that the operator's disputed rate increase is unreasonable, the refund shall be no greater than the difference between the operator's disputed rate and its (unchallenged) rate in existence as of the effective date of our rules.[907] As with all refunds for cable programming service rates, the refund liability will extend from the date a valid complaint is filed with the Commission.

376. In circumstances where the cable operator can, without undue administrative difficulty or unreasonable burden, identify actual subscribers who paid the unreasonable charge, we encourage the operator to do so, by refunding the overage directly to those subscribers either through direct payment or as a specifically identified credit to the subscribers' bill. To the extent refunds to actual subscribers who paid the overage is practicable, we believe that this is the preferred approach. As we recognized in the Notice, however, and as the comments from cable operators confirm, it may be difficult or impossible in many circumstances to identify with precision and to locate those actual subscribers who paid the overage.[908] Cable operators face constant changes in their subscriber base. Customers who subscribed to the service in question during all or part of the time the unreasonable rate was charged subsequently may have discontinued service and moved to another location. New subscribers who did not take service during the period at issue further complicate the process of identifying who properly is to receive a refund. The expense associated with identifying the exact parties eligible for a refund might well be disproportionately large in comparison to the individual refunds

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[907] This exception will not apply to prospective rate reductions. Thus, if we conclude that an operator's subsequent rate increase is unreasonable (but its existing rate as of the effective date of our rules was not challenged), we will employ our standard procedures for designating a reasonable rate that the cable operator must charge on a prospective basis. Because of the prospective nature of this remedy, Section 623(c)(3) does not preclude designation of a reasonable, prospective rate below the cable operator's existing rate as of the effective date of our rules.

[908] See Cole Comments at 44; Cox Comments at 80; CIC Comments at 82; Falcon Comments at 66-67; Nashoba at Comments 108-109; NCTA Comments at 77; TCI Comments at 60; Cablevision Reply at 54.

themselves. Accordingly, we shall grant the cable operator the option of implementing the refund by means of a prospective percentage reduction in the unreasonable service rate to cover the cumulative overcharge. This reduction will be reflected as a specifically identified one-time credit on prospective bills to the class of subscribers that had been unjustly charged.[909] However, to the extent an overcharge is associated with a separately priced tier of service, refunds should be made to the class of subscribers who receive that service.

377. Implementation. The cable operator will be required to implement any reduction in rates or refunds within 60 days from the date the Commission releases an order finding the contested rate to be unreasonable and mandating a remedy. We are persuaded that a 60-day time period to implement remedial measures will better accommodate standard billing cycles than the 30 day period we proposed in the Notice, thus preventing undue burdens on operators -- without adversely affecting subscribers.[910] Any unreasonable charges paid by customers after the filing of a complaint but prior to receiving a bill reflecting the reduced rate will be included in the calculation of refunds. In order to make subscribers whole, refunds shall include interest computed at the applicable published Internal Revenue Service rates for tax refunds and additional tax payments.[911] Interest shall accrue from the date the complaint is filed until the refund issues. We also affirm our tentative conclusion that Section 623(c) permits us to reduce rates and order refunds for the class of subscribers that paid unreasonable rates for a particular service, even if our determination with respect to a particular service rate was based upon a complaint

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[909] Cable operators may seek waiver of the one-time credit requirement for good cause shown, such as when the refund liability is so large that implementation of the refund through one-time credits would impair the operator's ability to provide service. See 47 C.F.R. § 1.3 (1992). In such circumstances, we will consider permitting the operator to implement the refund by spreading the credits to subscribers over a period of several billing cycles.

[910] See Cox Comments at 79; CIC Comments at 82; Cole Comments at 44.

[911] See, e.g., MCI Telecommunications Corporation v. Pacific Bell, et al., Memorandum Opinion and Order, 8 FCC Rcd 1517, 1530, para. 48 & n.124 (1993) (complaint against common carriers filed pursuant to 47 U.S.C. § 208); Heritage Cablevision Associates of Dallas, L.P. v. Texas Utilities Electric Company, Order, 8 FCC Rcd 373, 375, paras. 18, 19 (Com.Car.Bur. 1993) (pole attachment complaint against utility filed pursuant to 47 U.S.C. § 224).

filed by a single consumer.[912] A rate determined to be unreasonable when paid by an individual subscriber also is unreasonable with respect to all others subscribing to the same service. Seriatim decisions of unreasonableness as to individual subscribers are not only unnecessary, but would make implementation of Section 623(c) administratively infeasible.[913]

378. Review. We decline invitations by some cable operators to adopt an approach that would, in effect, automatically stay the effectiveness of rate reductions or refund requirements until all appeals of rate decisions are exhausted.[914] This approach might invite frivolous litigation from cable operators and needlessly delay relief to subscribers in situations where a cable operator's challenge to the Commission's rate determination lacked merit. Rather, we shall employ our existing procedures whereby the staff, acting on delegated authority, or the Commission may stay remedial requirements pending disposition of a petition for reconsideration or an application for review.[915] Cable operators, of course, may petition the Commission for a stay of remedial requirements. Such requests will be evaluated under well-established, judicially-approved standards.[916]

379. Enforcement. We adopt our proposed requirement that cable operators must certify their compliance with Commission orders requiring prospective rate reductions, refunds or other remedial relief to subscribers. No party opposes this proposal, and we agree with CFA that a certification procedure will reduce the burdens on all parties of monitoring a cable operator's compliance with our orders.[917] This certification shall be signed by an authorized representative of the cable

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[912] See Notice, 8 FCC Rcd at 534, para. 108; CFA Comments at 146 (concurring in this view).

[913] Thus, SBA's suggestions about how to handle complaints regarding previously adjudicated rates are moot. SBA Comments at 21-22.

[914] See Cox Comments at 79; CIC Comments at 82 (rate reductions should only be required after an appeal of a decision that a rate is unreasonable is final and is not subject to further review).

[915] See 47 C.F.R. § 1.102(b)(2), (3) (1992).

[916] See Washington Metropolitan Area Transit Comm'n v. Holiday Tours, Inc., 559 F.2d 841 (D.C. Cir. 1977); Virginia Petroleum Jobbers Ass'n. v. FPC, 259 F.2d 921 (D.C. Cir. 1958).

[917] See CFA Comments at 146. See also Commerce Comments at 4 (supporting certification requirement).

operator, shall reference the applicable Commission order, and shall state that the cable operator has complied fully with all provisions of that order. The certification shall also include a description of the precise measures the operator has taken to implement the remedies ordered by the Commission. The cable operator must file this certification with the Commission within 90 days of the release date of the order requiring remedial relief.[918]

380. As with any entity subject to FCC jurisdiction that fails to comply with a Commission rule or any provision of a Commission order, cable operators that fail to effect cable programming service rate reductions, refunds or other remedial measures mandated by the Commission will be subject to enforcement action. Such enforcement action may include, for example, monetary forfeitures pursuant to Section 503(b) of the Communications Act.[919] We will not impose forfeitures on a cable operator simply because a rate for cable programming service is found to be unreasonable.[920] We believe that the rate reduction and refund procedures we adopt herein provide adequate deterrence to violation of our rate regulations.[921] We will, however, exercise our forfeiture authority in those circumstances where a cable operator fails to comply with remedial requirements imposed by order after a finding of unreasonable cable programming service rates.[922] We cannot accept Cole's argument that

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[918] As noted above, cable operators must implement prospective rate reductions and refunds within 60 days of the release date of the Commission's order.

[919] 47 U.S.C. § 503(b). A cable operator that fails to comply with a Commission rule or order is subject to a forfeiture of up to $25,000 for each violation or each day of a continuing violation. The maximum forfeiture penalty for a continuing violation is $250,000. 47 U.S.C. § 503(b)(2).

[920] See House Report at 88 ("A finding that rates are unreasonable is not deemed a violation of law subject to the penalties and forfeitures of the Communications Act."). Of course, forfeitures may be imposed for violations of specific rules or statutory provisions.

[921] Moreover, the Cable Act provides that we establish procedures to reduce rates and order refunds, but does not appear to contemplate additional penalties for cable operators charging unreasonable rates.

[922] See Cablevision Reply at 54 (fines should be imposed only when operator fails to comply with a Commission determination); CFA at 146 (supports Commission's tentative conclusion that cable operators who fail to comply with relief ordered by Commission are

forfeitures would be "unduly harsh" given the uncertainty likely to surround rate regulation for the foreseeable future.[923] To the contrary, we believe that exercise of our forfeiture authority consistent with Section 503(b) of the Communications Act, and in the specific circumstances described above, is appropriate and necessary to effective implementation of the statutory scheme. Moreover, as CFA notes, there is no indication in the 1992 Cable Act or its legislative history that Congress intended to exempt cable operators from the Commission's existing forfeiture powers.[924]

381. Finally, we note that several municipalities urge the Commission to permit local franchising authorities to enforce the Commission's cable programming service rules through refunds and rate rollbacks.[925] As discussed above, however, the statutory provisions governing cable programming service rate complaints -- in contrast to the provisions governing basic service tier rates -- do not contemplate a formal role for local franchising authorities. Accordingly, although we will appreciate any informal assistance from local authorities, the statute does not authorize us to give local authorities any formal powers over implementation and enforcement of our cable programming service rate regulations.

c. Regulations Governing Rates

(1) Statutory Standards

i. Background.

382. Section 623(c) of the Communications Act requires the Commission to establish criteria for identifying, in individual cases, rates for cable programming services that are

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subject to forfeiture). CFA also suggests that the Commission should institute forfeiture proceedings against cable operators who fail to respond to complaints, inquiries and information requests within a reasonable time. CFA Comments at 141. In this regard, we will consider exercising our forfeiture authority in circumstances where the cable operator's failure to respond is willful and repeated. See 47 U.S.C. § 503(b)(1).

[923] See Cole Comments at 44.

[924] See CFA Comments at 146.

[925] Municipal Comments at 22; Palm Desert Comments at 3; NATOA Reply at 5.

unreasonable.[926] The Commission, in establishing such criteria, must consider the following factors:

(A) rates for similarly situated systems taking into account similarities in costs and other relevant factors;

(B) rates of systems subject to effective competition;

(C) the history of rates for the system including their relationship to changes in general consumer prices;

(D) the system's rates as a whole for all cable programming, cable equipment and cable services provided by the system, other than programming provided on a per channel or per program basis;

(E) capital and operating costs of the system; and

(F) advertising revenues.[927]

The Cable Act of 1992 also permits the Commission to consider other relevant factors for determining what constitutes unreasonable rates for cable programming services.[928]

383. In the Notice we tentatively concluded that the intent of the Cable Act of 1992 is "for the Commission to establish criteria to govern the determination in an individual case of whether rates for cable programming services are unreasonable" based upon a reasoned balancing of the factors enumerated above and other factors that the Commission in its discretion may choose to consider.[929] We also tentatively concluded that the Commission is granted, under the Cable Act of 1992, substantial flexibility in establishing these criteria.[930]

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[926] Notice, 8 FCC Rcd at 530, para. 90 citing Communications Act § 623(c)(1)(A), 47 U.S.C. § 543(c)(1)(A).

[927] Notice, 8 FCC Rcd at 530, para. 90; and Communications Act § 623(c)(2), 47 U.S.C. § 543(c)(2).

[928] Notice, 8 FCC Rcd at 530, para. 90 citing Communications Act § 623(c)(1)(A), 47 U.S.C. § 543(c)(1)(A).

[929] Notice, 8 FCC Rcd at 530, para. 91.

[930] Notice, 8 FCC Rcd at 530, para. 91.

The Notice observed that while the Cable Act of 1992 requires the Commission to "establish regulations that assure rates for the basic service tier are reasonable," for programming services, the Act directs the Commission to establish standards that permit identification in individual cases of rates that are "unreasonable."[931] The Notice asked if this differing language required that we adopt a different standard of reasonableness for basic service tier rates and for cable programming services rates. We then asked for comment on "whether our regulations identifying unreasonable cable programming service rates, will necessarily define the 'reasonable' rates for such services," and "whether Congress instead intended more of an egregious standard for cable programming services than for basic tier rates."[932]

ii. Comments.

384. The majority of the parties agree with our tentative conclusion in the Notice that the intent of Section 623(c) of the Communications Act is for the Commission to establish criteria to govern the determination, in individual cases, of whether rates for cable programming services are reasonable based upon a reasoned balancing of the factors enumerated in Section 623(c)(2) and other factors that the Commission in its discretion chooses to consider.[933]

385. Cable operators assert, however, that the Cable Act of 1992 establishes a different substantive standard for the rate regulation of cable programming services than for the basic service tier.[934] They contend that Congress, in Section 623(c) of the Communications Act, bestowed upon the Commission primarily an oversight role in regulating rates for cable programming services.[935] Cable operators thus argue that Congress intended that the rate regulation provisions of the Cable Act of 1992 governing cable programming services should be applied only to

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[931] Notice, 8 FCC Rcd at 530, n.127.

[932] Notice, 8 FCC Rcd at 530, n.127.

[933] Notice, at 531, para. 91. See, e.g. Newhouse Comments at 40-42; Continental Comments at 53; AdelphiaII Comments at 97; Nashoba Comments at 96; AEN Comments at 15; USA Comments at 13.

[934] See, e.g. Comcast Comments at 5; Continental Comments at 52; InterMedia Comments at 30; Nashoba Comments at 95-96; AdelphiaII Comments at 96-97; Newhouse Comments at 38-41; TimeWarner Comments at 4 and 38.

[935] See, e.g. NCC Comments at 27; CIC Reply Comments at 55-56.

cable systems that exhibit egregious conduct.[936] They assert that Congress only intended to regulate rates for cable programming services as a fail-safe mechanism to rein in renegade cable operators charging rates far above the industry average.[937] As TimeWarner explains, Congress intended for the Commission to only target the two to five percent of cable systems that are "renegades."[938] Therefore, they assert, the cable programming service rate regulation provisions may apply only to the "bad actors" among cable system operators, as opposed to the more encompassing regulation of basic service rates.[939]

386. Other commenters contend that the terms "reasonable" and "unreasonable," as found in the Cable Act of 1992, do not have different substantive meanings.[940] According to Austin, the reasonable and not unreasonable standards mandate the same regulatory treatment of rates for basic and cable programming services.[941] They maintain that the Commission is required to regulate cable programming service rates under the same reasonableness standard that is mandated for basic service in the Cable Act of 1992.[942] These commenters thus contest the conclusion of commenting cable operators that Congress intended a bad actor standard to apply to the regulation of rates for cable programming service.[943] NYConsumers argues that the legislative history of the Cable Act of 1992 does not support the conclusion that an "egregious" standard applies for the regulation of cable

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[936] See, e.g. Blade Comments at 8; Comcast Comments at 32-33 and 38; CATA Comments at 5; NCTA Comments at 5, 55 and Attachment at 17; TimeWarner Comments at 40-41.

[937] See, e.g. AdelphiaII Reply Comments at 56; see also TimeWarner Reply Comments at 41.

[938] TimeWarner Comments at 43 and Attachment at 38; see, e.g. Continental Comments at 52; NCTA Comments at 59.

[939] See, e.g. AdelphiaII Comments at 99-100; Blade Comments at 8; Cole Comments at 39-40; Comcast Comments at 32-33 and 38; Continental Comments at 2; Nashoba Comments at 98-99; Newhouse Comments at 37-39; TCI Comments at 6 and 27; CIC Reply Comments at 20; Continental Reply Comments at 30-31; Cole Reply Comments at 30.

[940] See, e.g. CFA Comments at 80-83; NATOA Comments at 71; Schaumberg Comments at 7 and 10.

[941] See, e.g. Austin Reply Comments at 6.

[942] See, e.g. Austin Reply Comments at 7; CFA Reply Comments at 5-6.

[943] See, e.g. NATOA Comments at 70-71.

programming services rates.[944] These parties argue that targeting only two to five percent of the highest price cable systems, as suggested by NCTA, would fail to fulfill the mandate of the Cable Act of 1992.[945]

iii. Discussion.

387. We conclude, as for the basic service tier, that our standards for identifying cable programming services rates that are unreasonable in individual instances will comply with the statute if our standards reflect a reasoned balancing of the statutory factors, and if we adequately explain how our standards reflect these statutory factors. We also find that, although not mandated by the statute, we should give primary weight to the rates of systems subject to effective competition. This will address congressional concerns that rates of systems not subject to effective competition reflect undue market power.[946]

388. We further find that a "bad actor" standard for rates for cable programming services would not fulfill the mandate of the statute. First, given the congressional concern that rates for cable programming services may be high, we are not persuaded that Congress mandated a more lenient standard for

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[944] NYConsumers Comments at 13; see, e.g. Austin Reply Comments at 7; Hollywood Reply Comments at 5-6; NATOA Reply Comments at 18; CFA Reply Comments at 5; Hollywood Reply Comments at 5-6; NYNEX Reply Comments at 10.

[945] See, e.g. BellAtlantic Reply Comments at 2-3.

[946] The Cable Act of 1992 requires that we consider the rates of systems subject to effective competition in fashioning regulations governing rates for cable programming services. Our regulations consider this factor by adoption of a formula that calculates a competitive benchmark for a given system. Under this formula, the benchmark rate level applicable to a system is based on the rates of systems operating in competitive markets with a similar number of channels, subscribers, and satellite-delivered channels. Thus, use of the benchmark to determine initial regulated rate levels effectively addresses the statutory factor of the rates of similarly situated systems. We have additionally addressed other system characteristics that could be incorporated into the benchmark in connection with our requirements for the basic service tier. Those determinations are equally applicable for design of the benchmark as applied to cable programming services. While the benchmark is not directly cost-based, our survey was based on an analysis of cable rates that presumptively recovered costs. Thus, our requirements for cable programming services take into account similarities in costs and other relevant factors.

regulation of cable programming services rates than for the basic service tier. While portions of the legislative history of Section 623(c) of the Communications Act evidence congressional views that only a minority of operators have egregiously high rates for cable programming services, they do not reveal an intent that our regulations may not identify rates above the competitive level as potentially unreasonable, even if they fall short of some standard of egregiousness.[947] Further, the statutory language describing rate regulation for basic and cable programming services, respectively, does not necessarily lead to different outcomes in application, in that the measure of the extent to which rates for cable programming services are excessive will be the difference between the challenged rate and the reasonable rate. Once this measure of unreasonableness is determined, we can order refunds and reduce rates to a "reasonable" level.[948]

389. Cable operators interpret the language of Section 623(c) to show a congressional intent that rates for cable programming services should trigger Commission action only if those rates are egregious. We conclude, however, that an equally justifiable reading of the statutory language, and one better supported by the legislative history, is that the language simply reflects the different procedural regulatory schemes Congress adopted for protecting consumers from excessive rates for basic and for cable programming services rather than different substantive standards. Basic rates are reviewed before they become effective; regulators are directed to assure that these rates will be reasonable. For cable programming services, however, rates are reviewed only after they have become effective. At that point the concern is to identify and reduce rates that are in place and not reasonable. Given that the Commission will be reviewing rates that are already in effect, it would make little sense to require the Commission to establish for cable programming services proactive standards designed to assure that rates are "reasonable." Accordingly, we reject arguments that we should adopt a bad actor standard to identify only the most excessive rates for cable programming services in

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[947] House Report at 86 (in discussing that most increases of rates for cable programming services have been reasonable, the Committee found that only "a minority of cable operators have abused their deregulated status and have unreasonably raised rates...In some cases...those rate increases have been egregious.") Id. See House Report at 68; and 138 Cong. Rec. S14224 (daily ed. Sept. 29, 1992) quoting Senator Inouye (the "bad actor" provision allows the Commission, on a case-by-case basis, to regulate rates for cable programming services, if it finds that they are "unreasonable.")

[948] Communications Act §623(c)(1)(C), 47 U.S.C. §543(c)(1)(C).

individual instances and rather will apply rate-setting standards grounded in the effective competition principles that Congress repeatedly emphasized throughout the legislative history of the Act.[949]

(2) Benchmarking versus Cost-of-Service

i. Background.

390. In the Notice we solicited comment on whether the Commission should adopt a regulatory approach based upon a benchmark or upon a cost-of-service methodology to govern rates for cable programming services.[950] We additionally included a price cap mechanism as a possible way to regulate rates for cable programming services. We tentatively concluded, as we did for basic service rate regulation, that traditional cost-of-service regulation would not be the best primary method to regulate the rates of cable programming services.[951]

ii. Comments.

391. Most commenters generally favor the same overall approach for regulation of cable programming service as for the basic service tier and for the same reasons. Thus, the majority of parties advocate a benchmark approach for the rate regulation

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[949] We also reject the view that because the factors enumerated in the statute are different for basic and for cable programming services, we must necessarily adopt different implementing standards for basic and cable programming services. Rather, we believe that we may adopt the same, or different, implementing standards as long as the standards we adopt meet statutory objectives and our standards for both tiers adequately take into account the respective statutory factors for each. The Cable Act of 1992 also permits the Commission to consider other relevant factors in establishing regulations governing cable programming services. We believe that our determinations concerning tier-neutrality are entitled to significant weight in establishing requirements for cable programming services. We believe that tier-neutrality outweighs other potentially conflicting statutory or other considerations that might warrant different rate standards for the basic and higher tiers. Thus, we choose to establish the same standards of reasonableness for the basic and cable programming service tiers.

[950] Notice, 8 FCC Rcd at 530-531, para. 92; see also id. at 519, para. 33.

[951] Notice, 8 FCC Rcd at 530-531, para. 92.

of cable programming services.[952] These parties point to various factors, such as administrative ease and pricing flexibility, as reasons why the Commission should adopt a benchmark for use as the primary rate regulatory methodology for cable programming services.[953] The parties that favor cost-of-service regulation of cable programming service rates argue that this approach will fulfill Congressional intent behind the Cable Act of 1992.[954] CFA strongly advocates the same cost-of-service approach to rate regulation of cable programming services as it does for basic service.[955] NJ recommends a formula that provides that the rate for cable programming service equals the actual cost of acquiring programming and transmission, less any revenues received, plus a reasonable profit, derived on a simple cost basis.[956]

iii. Discussion.

392. As for the basic service tier, we agree with the majority of parties in this proceeding that a cost-of-service methodology would not be the best primary method of regulating the rates for cable programming services.[957] We acknowledge that cost-of-service regulation, assiduously applied, has potential benefits: it can allow close supervision of rates and can readily be tailored to individual company circumstances. In theory, it can both allow companies the revenues needed to meet service demands and preclude monopoly profits. However, applying cost-of-service regulation to thousands of cable systems would impose tremendous administrative burdens on regulatory authorities and cable operators. Furthermore, cost-of-service regulation provides no incentive to cable operators to be

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[952] See, e.g. Cox Comments at 5 and 24-25; CIC Comments at 6; Carbondale Comments at 5-6; Conn Comments at 10; AEN Comments at 15-16.

[953] See, e.g. CIC Reply Comments at 21-22; Newhouse Comments at 42.; Continental Comments at 50-51.

[954] See, e.g. Minn Comments at 20-21; CFA Comments at 86; NJ Comments at 21.

[955] However, until the Commission can formulate such an approach, Consumer Federation of America recommends a benchmark type methodology, the "global formulaic" approach to rate regulation of cable programming services, as it does for basic services. CFA Comments at 86; see, e.g. Austin Reply Comments at 33-36.

[956] NJ Comments at 21.

[957] See, e.g. NCTA Comments at 58-59; Continental Comments, Appendix B at 1.

efficient, improve service and make cable service more attractive to consumers.[958] Based upon this balancing, we conclude that the disadvantages would clearly outweigh the advantages of cost-of-service regulation as the primary method for cable programming service rate regulation. In addition, we believe that a price cap will have the same advantages for regulation of cable programming services as for the basic service tier. Accordingly, we have determined that, as for the basic service tier, we should also incorporate a benchmark approach into our plan for regulation of cable programming services.

(3) Adoption and Application of the Benchmark and Price Cap for Cable Programming Services.

i. Background.

393. In the Notice, we proposed and solicited comment on the same approaches for cable programming services as for the basic service tier. Thus, we solicited comment on establishing for cable programming services several benchmark alternatives that define a zone of reasonableness above which rates for cable programming services would be presumptively unreasonable, and on a price cap alternative. We solicited comment on what individual system characteristics should be reflected in the regulatory scheme for cable programming services, and whether there should be annual adjustments to reflect increases in the general cost of doing business.

ii. Comments.

394. Commenters generally raised the same concerns about the proposed overall regulatory structure for cable programming services as for the benchmark for the basic service tier.[959] Thus, cable operators contend that there should be no cap on the ability of cable operators to raise rates for cable programming services, while many other parties contend that there should be such a cap.[960] Cable operators also offer various proposals as to what individual system characteristics should be reflected in the rate regulations, and urge that certain

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[958] See Notice, 8 FCC Rcd at 524, para. 58.

[959] See, e.g. Lifetime Comments at 6; NATOA Comments at 71; Schaumberg Comments at 7 and 10.

[960] See, e.g. Harron Comments at 13; Comcast Comments at 39; NATOA Comments at 70-71.

categories of costs should be treated as external to the cap or benchmark.[961]

395. The majority of commenters other than cable operators [962] recommend that the Commission adopt the same basis for determining the rate level for cable programming services, as for basic services.[963] Most cable operators, on the other hand, believe that the benchmark should reflect the "bad actor" standard for cable programming services and thus offer alternatives for the benchmark for cable programming services that would generally achieve a higher rate level for the benchmark for cable programming services.[964] Cable operators urge, for example, adoption of: 1)a benchmark based on current rates;[965] 2) a basket approach to setting a benchmark;[966] 3) an

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[961] See, e.g. Armstrong Comments at 30; Intermedia Comments at 29.

[962] However, there are some parties other than cable operators who support the adoption of a different benchmark for cable programming services than for basic service. For example, several municipalities advocate an approach that would use a benchmark based upon a comparison of similar second tier services in other communities where the cable operator is also franchised. BowlingGreen Comments at 24-26; Carson Comments at 24-26; Conneaut Comments at 24-27; Drexel Comments at 24-26; Keys Comments at 24-26; McKinney Comments at 24-27; NewBern Comments at 24-26; Paducah Comments at 25-27; Parsippany Comments at 24-27; Salisbury Comments at 24-27; St. Pete Comments at 26-28; Williamston Comments at 24-26.

[963] See, e.g. NATOA Comments at 70.

[964] See, e.g. Blade Comments at 7-8; Nashoba Comments at 100-103; and AdelphiaII Comments at 101-104.

[965] A benchmark based on current rates for cable programming services would be defined by examining the overall price for both basic and programming services, as well as the price for the installation, additional outlets and equipment rental. Adjustments would be made to the benchmark for inflation and the cost of capital. Additionally, the costs of retransmission consent, customer service and changes approved or mandated by franchise authorities would be incorporated directly into the cable programming services benchmark on a system specific basis. Furthermore, changes in costs that directly affect cable programming services, e.g. changes in costs of obtaining programming, and costs that account for rebuilds, upgrades and system expansion, including a reasonable profit on both, would be passed directly through the benchmark. Once such an adjustment is made it would become a permanent part of a cable operator's

outlier approach;[967] and 4) an annual survey of statutory factors

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benchmark for that system. Under this approach, the Commission would consider a variety of factors, such as the reasonableness of basic rates, the geography of the community, unusual franchise requirements and a reasonable return on capital costs, substantial increases in programming costs, costs associated with rebuilds and the costs of new services being provided to cable subscribers, in determining whether an above-benchmark rate for programming services is unreasonable. See, e.g. CIC Comments at 34-37 and 40; Cox Comments at 26, 29-31.

[966] A benchmark based upon a "basket" approach would consist of the following:

> the weighted average revenue per subscriber from all regulated tiers of service, including the basic service tier, plus the weighted average revenue from each subscriber for all regulated items of equipment, plus an amortized portion of installation fees, where the weights are either the number of subscribers to a tier of service or the number of units of an equipment item relative to the number of basic subscribers, divided by the subscriber-weighted number of channels.

This benchmark is expressed on a subscriber-channel per month basis. To identify systems with unreasonable rates, the Commission would distinguish rates that are unreasonably high from those that are high for reasons unrelated to the Cable Act of 1992, using the same process of statistical identification of factors that explain rate variation described in connection with basic service. See paras. As with basic service, some of the factors could be used to form a grid, into a cell of which each system would fall. The benchmark standard would single out systems with the highest statistical unexplained average subscriber revenues as presumptively unreasonable; the remaining systems would be regarded as having reasonable cable programming service rates. The cable programming services benchmark would be adjusted annually based on changes in the median rates of regulated systems. The Commission would not limit the increases in the rates for programming services, i.e. create a price cap, as long as the benchmark is not violated. See, e.g. AdelphiaII Comments at 104; Nashoba Comments at 103; Falcon Comments at 60-61 and 68; Newhouse Comments at 42; NCTA Comments at 60-61 and Attachment at 25-26.

[967] This approach would require the Commission to determine rates for cable programming services on the basis of aggregate rates for basic service and cable programming service, including expanded basic service and unregulated equipment. Through a sampling process, the Commission would survey the relevant prices on a per channel basis within system categories and identify a

approach.[968]

iii. Discussion.

396. We have explained and justified in detail adoption and application of the benchmark approach that will be used to set the initial per channel rate for the basic service tier, and application of the price cap to govern future rate increases once the initial rate level has been set by comparison to the benchmark. We explained that the statute expresses a concern that rates may be unreasonably high due to lack of effective competition, and our industry survey reveals an average competitive rate differential of approximately 10 percent. This competitive rate differential exists for cable programming service rates as well as for basic service tier rates. We also addressed the considerations concerning application of a price cap to basic tier rates, the annual inflation adjustment, and the appropriate treatment of external costs. These considerations are applicable to the cable programming services tier as well. In addition, as we have explained in connection with our discussion of whether we should establish a low cost basic service tier, we have determined that a tier-neutral implementation of rate regulation of cable service is preferable to establishing different rate regulation schemes for basic and higher tiers. Accordingly, we will adopt the same benchmark approach for purposes of resolving complaints regarding cable programming services as for the basic service tier and apply it in the same manner to determine the initial permitted per channel rate for cable programming services.[969] Further, we will adopt

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threshold at, for example, a two standard deviations from the norm. Only those cable systems whose prices are beyond the threshold on a per channel basis for their category would be subject to complaint for unreasonable programming service rates. The Commission could adjust the two standard deviation formula if it proves to be excessively or insufficiently encompassing. See, e.g. Comcast Comments at 35-36; TimeWarner Comments at 43.

[968] This benchmark approach would require the Commission to survey sample data each year that satisfies the major factors in the Section 623(c) of the Cable Act. The Commission would then publish these data and use them to establish guidelines for answering complaints concerning unreasonable rates for cable programming services. NCC Comments at 27.

[969] As indicated, in accordance with determinations that our rate regulations should be tier neutral, the benchmark expresses the competitive rate level across all tiers. The method for determining the appropriate rate level by comparison to the benchmark is the same for the basic service tier and cable programming services, and is described in detail in FCC Form 933.

the same price cap requirements for purposes of resolving cable programming services complaints as for the basic service tier.[970] Thus, we adopt the same annual adjustment index and the same requirements for, and treatment of, external costs for cable programming services as was adopted for the basic service tier.

397. Thus for purposes of adjudicating an initial complaint and any future complaint received after a rate increase, a per channel rate for cable programming services at or below the benchmark in effect at the time the complaint is filed will be considered reasonable and will be the permitted rate.[971] For a system with rates at the time of regulation that are above the benchmark, the permitted rate level for such systems will be determined by a further comparison to the benchmark of the system's rates in effect on September 30, 1992. If the system's September 30, 1992 rates were also above the benchmark its permitted rate shall be its September 30, 1992 per channel rate reduced by the industry-wide competitive rate differential of 10 percent, (or to the benchmark, whichever is less), adjusted forward for inflation.[972] If the system's rates in effect on September 30, 1992 were below the benchmark, the permitted rate

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[970] The Cable Act of 1992 requires that we consider, in fashioning regulations governing rates for cable programming services, the history of rates for the system including their relationship to changes in general consumer prices. Communications Act, § 543(c)(2)(C), 47 U.S.C. § 623(C)(2)(C). As explained in para. 205-207, supra, we have considered the use of past regulated rates to determine regulated rate levels. For the reasons stated there, we choose not to incorporate directly past regulated rates into our scheme for regulation of cable programming services. However, our survey was based on rates in effect on September 30, 1992 and thus our benchmark formula is industry based on the history of rates as existing at that time. We determine that the rates of systems subject to effective competition shall be given greater weight in fashioning regulations to govern cable programming services than this statutory factor.

[971] Rates for cable programming services will become subject to regulatory review at the time a complaint is filed with the Commission. Rates in effect on the date on which the complaint is filed shall be the rates to which the initial comparison to the benchmark is made.

[972] As we explain below, the permitted rate is also to be adjusted based on changes in the number of channels provided since September 30, 1992. We also note that the permitted rate excludes charges for equipment, since equipment is charged and regulated separately from service charges.

shall be the benchmark rate adjusted forward by inflation. Our price cap rate will then be used to evaluate to the reasonableness of rates for cable programming services with respect to subsequent complaints. Price cap standards will be the same as for the basic service tier.

(3) Secondary Cost-of-Service Showings

i. Background.

398. In the Notice, we proposed to permit cable operators to justify a rate above benchmark or capped levels based on cost-of-service showings. We solicited comment on what cost-of-service standards should be adopted to govern the extent to which cable operators would be able to justify rates based on costs.

ii. Comments.

399. Commenters raise the same points concerning secondary cost-of-service showings for cable programming services as for the basic service tier. Cable operators and most commenters agree that we should permit cable operators to exceed the benchmark rate for cable programming services based on costs.[973] Some commenters, however, contend that we should not establish standards and procedures by which cable operators may raise rates based on costs, but rather should require rates to remain at the benchmark level unless that would be confiscatory for the cable operator.[974] Commenters did not specifically urge adoption of separate cost-of-service standards for cable programming services.

iii. Discussion.

400. We have explained above the reasons for permitting cable operators to exceed capped levels for the basic service tier if they make an adequate cost showing.[975] We explained that the starting capped rate is based on industry data and does not necessarily reflect individual systems' costs of providing service. We further noted that an overly tight cap on rates could hinder the ability of operators to make improvements that would benefit consumers and that Congress did not intend that cable operators be required to provide service at a loss. These same reasons apply with equal force in the complaint

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[973] See, e.g. CIC Comments at 36-37; Cox Comments at 31-32; Hawaii Reply Comments at 3.

[974] See, e.g. NATOA Comments at 44-46.

[975] See paras 258-264, supra.

context for cable programming services. Commenters have not raised different concerns for cable programming services.[976] Accordingly, when reviewing cable programming service complaints, we will permit cable operators to exceed the benchmark rate for cable programming services if they can justify such departures based on costs.[977]

401. Similarly, we conclude that we should adopt cost-of-service standards for the Commission to apply to determine the extent to which cable operators may exceed capped rates for cable programming services. Such standards are necessary to define the costs and level of profits that will permit a reasoned decision as to whether an existing rate or increased rate is unreasonable. Further, cost-of-service standards will permit the Commission to strike a reasonable balance between the interests of consumers in paying a fair rate and of cable operators in recovering their costs and earning a reasonable profit. Accordingly, as for the basic service tier, we will additionally establish cost-of-service standards to govern cable programming services. However, as for the basic service tier, the record does not permit the Commission to fashion at this time cost-of-service standards with assurance that the standard will balance these two conflicting interests in a way that serves the public interest. Accordingly, as already indicated, we will shortly adopt and issue separately a Second Further Notice to establish such standards for cable service including cable programming services.[978]

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[976] The Cable Act of 1992 requires that we consider in establishing rates for cable programming services the system's rates as a whole for all cable programming, cable equipment and cable services provided by the system, other than programming provided on a per channel or per program basis. Communications Act, Section 623(c)(2), 47 U.S.C. Section 543(c)(2). Our requirements for cable programming services take this factor into account by providing that permitted rates are based on averaged rates across all tiers. In addition, we can consider in cost-of-service showings overall earnings for all regulated services. Cost-of-service showings also permit us to take into account the statutory factor of capital and operating costs. Id.

[977] As we pointed out for basic service, however, the fact that an operator has incurred costs does not necessarily establish a right to recover those costs from subscribers. The extent to which costs can be recovered from subscribers will be governed by cost-of-services principles designed to be fair to cable operators and their subscribers.

[978] Pending this rulemaking we will review showings by cable operators seeking to justify rates above the otherwise permitted level based on costs on a case-by-case basis. Under the procedures we are adopting for resolution of complaints alleging excessive

(4) Installation or Rental of Equipment Used to Receive Cable Programming Services

(a) Equipment Subject to Regulation as Cable Programming Services

i. Background.

402. The Cable Act of 1992, in defining "cable programming services," includes within the scope of this term installation and equipment rented to receive cable programming service.[979] However, in the Notice, we noted some ambiguity in the Act as to whether Congress "intended to limit regulation, on the basis of actual cost, to that equipment only used for basic tier services."[980] We stated our belief that equipment used for the receipt of cable programming service is to be regulated by the Commission based upon the mandates of Section 623(c) of the Communications Act, under the "not unreasonable" standard.[981]

403. In the Notice, we asked "what customer equipment, if any, Congress intended to include within the definition of cable programming services."[982] In particular, we asked "whether the Act contemplates any regulations applicable to such equipment beyond those applicable to cable programming services generally."[983] We also sought comment on whether "we should adopt uniform rules to govern regulation of rates for equipment used to receive the basic tier and for equipment falling within the definition of "cable programming service."[984]

ii. Comments.

404. The majority of cable operators argue that a use test should determine how equipment and installation is

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rates for cable programming services, cable operators may maintain their rate in effect pending our adjudication of the complaint subject to refund liability dating from the day the Commission received the complaint.

[979] Communications Act § 623(l)(2), 47 U.S.C. § 543(l)(2).

[980] Notice, 8 FCC Rcd at 525-526, para. 65.

[981] Notice, 8 FCC Rcd at 525, para. 64.

[982] Notice, 8 FCC Rcd at 530-531, n. 129; see id. at 525-526, para. 65.

[983] Notice, 8 FCC Rcd at 531, n.129.

[984] Notice, 8 FCC Rcd at 531, n.129.

regulated, with the regulation dependent upon the level of cable service the subscriber receives.[985] Some other cable operators maintain that cable programming service equipment should not be subject to any additional regulation, as long as rates for the cable programming service tier, as a whole, are not unreasonable.[986] Most of these parties also allege that adopting actual cost as a standard for equipment used to receive cable programming services would be contrary to the language and legislative intent of the Cable Act of 1992, and would stifle competition and the development of new technology.[987] Some parties also maintain that equipment that is used to receive pay per channel or per program services is unregulated only if it is not used to provide either basic or programming services.[988] These parties claim that this is consistent with the legislative intent behind the Cable Act of 1992.[989]

405. Still other parties argue that all equipment should be regulated based upon the actual cost standard, no matter what kind of service or programming the equipment is used to receive.[990] These parties allege that this meets Congressional intent, in that Congress intended that low rates should be charged for all cable equipment.[991]

iii. Discussion.

406. Section 623(b)(3) of the Communications Act directs the Commission to establish standards, based upon actual costs, for the "rates and prices for the installation and lease of the equipment used by subscribers to receive the basic service

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[985] See, e.g. Continental Comments at 38; InterMedia Comments at 22; Nashoba Comments at 68; AdelphiaII Comments at 67; TCI Comments at 31; Armstrong Comments at 22.

[986] See, e.g. Intermedia Comments at 31-32; Armstrong Comments at 30.

[987] See, e.g. TCI Comments at 32-36; TimeWarner Reply Comments at 45; Comcast Comments at 46 and 50 and Attachment, "Technology Considerations."

[988] CFA Reply Comments at 12.

[989] See, e.g. NATOA Comments at 48-49; Municipal Reply Comments at 44-47.

[990] See, e.g. Sommerville Comments at 5-6; NewBedford Comments at 5; Schaumberg Comments at 9; Conn Comments at 12.

[991] See, e.g. Conn Comments at 12.

tier."[992] As we discussed earlier in this Report and Order, we have concluded that Section 623(b)(3) of the Communications Act requires us to regulate rates for any rental of equipment used to receive basic service, as well as associated installations required to receive basic service, on the basis of actual cost, regardless of whether this equipment or installation is also used to receive a higher level of cable service.[993] However, we do not believe that the statute requires us to apply the actual cost standard to the rental of equipment or an installation that is used solely to receive cable programming services. The regulatory standard governing the rates for installation and the lease of equipment used solely to provide cable programming services, or to provide both cable programming services and per channel or per program services, is the not "unreasonable" standard found in Section 623(c) of the Communications Act.

407. Nonetheless, we have determined that equipment used to receive cable programming services shall also be subject to the same actual cost standard we implement for basic tier equipment. While we are not required to apply this standard, we believe that application of this standard will be less burdensome than would application of separate standards for equipment used to receive separate tiers. Moreover, using an actual cost plus a reasonable profit standard for cable programming service equipment and installations will best protect subscribers from paying unreasonable rates in this area, as Congress intended. The standard will enable operators to charge at least what they could charge in a competitive market, and thus, will be fair to both systems and subscribers. Accordingly, the costs of equipment used to receive cable programming services shall be included in the Equipment Basket and the charges associated with this equipment shall be determined on the same basis as charges for other equipment subject to the actual cost methodology. However, because the Commission has jurisdiction over cable programming services, the Commission will review any complaints or issues concerning such equipment.

(b) Unbundling of Rates for Installation and Rental of Equipment Used to Receive Cable Programming Services

i. Background.

408. In the Notice, we tentatively concluded that, based upon the language and legislative history of the Cable Act of 1992, rates for equipment and basic service should be

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[992] Communications Act § 623(b)(3)(A) and (B), 47 U.S.C. § 543(b)(3)(A) and (B).

[993] Para.283, supra.

unbundled from one another.[994] We also concluded that rates for installation "should not be bundled with rates for lease of equipment."[995] We stated our belief "that this unbundling could help to establish an environment in which a competitive market for equipment and installation may develop."[996] We also sought comment on whether we should adopt uniform rules to govern regulation of rates for equipment used to receive the basic tier and for equipment falling within the definition of cable programming service.[997]

ii. Comments.

409. Many parties argue that the Commission should unbundle rates for the lease of equipment and installation from rates for all cable services, including cable programming and pay per program and per channel services.[998] They contend that this will help promote a competitive equipment market.[999] Other parties, mainly cable operators, argue strongly against the unbundling of all equipment and installation rates from basic service, (as well as installation from equipment rates)[1000] and by implication, against the unbundling of these rates from cable programming and pay per program or per channel services.[1001] For example, Encore argues that the Commission should allow bundling of per channel programming with equipment that is necessary or desirable for the receipt of that service.[1002]

iii. Discussion.

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[994] Notice, 8 FCC Rcd at 525, para. 63.

[995] Notice, 8 FCC Rcd at 525, para. 63.

[996] Notice, 8 FCC Rcd at 525, para. 63 citing Communications Act §624, 47 U.S.C. §544.

[997] Notice, 8 FCC Rcd at 531, n.129.

[998] See, e.g. NYNEX Comments at 11; Austin Comments at 54; Multiplex Comments at 12-13; CFA Reply Comments at 14.

[999] See, e.g. SquareD Comments at 4; EIA Comments at 4-5; CFA Reply Comments at 15.

[1000] AdelphiaII Reply Comments at 38.

[1001] See, e.g. TimeWarner Comments at 59-60 and 64-65; Falcon Comments at 47.

[1002] Encore Comments at 9-10.

410. We conclude that cable operators should be required to unbundle equipment and installation rates from rates for cable programming services, and also unbundle installation rates from equipment rates used solely to receive these services. While Section 623 of the Cable Act of 1992 does not explicitly direct us to take this action, we find that it will enhance customers' and this Commission's ability to assess the reasonableness of any charges for equipment provided as part of cable programming services. It will also serve the statutory purpose of promoting "the commercial availability, from cable operators and retail vendors that are not affiliated with cable systems, of converter boxes and of remote control devices compatible with converter boxes."[1003] We have found, in the common carrier service and equipment markets, that unbundling of service rates from equipment rates has been essential to creating the vigorous competition that now exists in the customers premises equipment market.[1004] On the other hand, we have found bundling can eliminate virtually all competition for certain services, "because bundling forces...subscribers to pay...for services even when the subscribers obtain them from other sources."[1005] We believe that these findings are equally pertinent to cable equipment and installation markets.

411. Section 2(b)(5) of the Cable Act of 1992 states that one of the policies the Act is designed to promote is "ensur[ing] that cable operators do not have undue market power vis-a-vis ... consumers."[1006] Bundling of equipment and services is one industry practice that Congress has identified as contributing to the market power of cable operators.[1007] We believe that by requiring the unbundling of all cable service rates from equipment and installation, as well as the unbundling

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[1003] Communications Act §624, 47 U.S.C. §544.

[1004] See Detariffing the Installation and Maintenance of Inside Wiring, Third Report and Order, 7 FCC Rcd 1334, 1335, at para. 8 (1991); see also Amendment of Section 64.702 of the Commission's Rules and Regulations (Computer II), 77 FCC 2d 384, 441-447 (1980), modified on recon. 84 FCC 2d 50 (1981), aff'd sub. nom. Computer and Communications Industry Ass'n v. FCC, 693 F.2d 198 (D.C. Cir. 1982), cert. denied 461 U.S. 938 (1983).

[1005] Detariffing the Installation and Maintenance of Inside Wiring, Third Report and Order, 7 FCC Rcd 1334, 1335, para. 8 (1991).

[1006] Cable Act of 1992, Section 2(b)(5).

[1007] See Senate Report at 19-20.

of equipment and installation rates from each other, we promote this legislative goal.[1008]

412. For these reasons we find that it is in the public interest to require the unbundling of rates for cable programming services from rates for installation and the lease of equipment.[1009] We also find that the public interest will be served by requiring the unbundling of installation rates for these services, from rates for equipment leasing. We believe that subscribers will not only have more choices in purchasing and leasing these services as a result of such unbundling, but will also benefit from lower rates that occur as a result of competition we anticipate will develop.

5. Provisions Applicable to Cable Service Generally

a. Geographically Uniform Rate Structure

i. Background.

413. The Cable Act of 1992 requires cable operators to "have a rate structure, for the provision of cable service, that is uniform throughout the geographic area in which cable service is provided over its cable system."[1010] The Notice proposed regulations which require a uniform rate structure throughout the geographic area served by the cable system, but tentatively concluded that geographic rate uniformity does not prohibit reasonable categories of service with separate rates and terms and conditions of service.[1011] The Notice noted further that the uniformity requirement did not preclude reasonable discriminations in rate levels among different categories of customers, provided the rate structure containing the

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[1008] More generally, we have found in common carrier regulation that, "[i]n general, bundling of goods and services may restrict the freedom of choice of consumers and restrains their ability to engage in product substitution." Amendment of Section 64.702 of the Commission's Rules and Regulations (Computer II), 77 FCC 2d 384, 441-447 (1980), modified on recon. 84 FCC 2d 50 (1981), aff'd sub. nom. Computer and Communications Industry Ass'n v. FCC, 693 F.2d 198 (D.C. Cir. 1982), cert. denied 461 U.S. 938 (1983).

[1009] We note that the Communications Act provides us with the authority necessary to "perform any and all acts, make such rules and regulations, and issue such orders, not inconsistent with this act, as may be necessary in the execution of its functions." Communications Act § 4(i), 47 U.S.C. § 154(i).

[1010] Communications Act, § 623 (d), 47 U.S.C. § 543 (d).

[1011] Notice, 8 FCC Rcd at 534.

differentiations is uniform throughout a cable system's geographic service area.[1012] The Notice sought information concerning the extent to which cable operators currently offer discounted rates and other special terms and conditions to some customers or types of customers, and solicited comment on whether cable operators should be afforded the flexibility to establish bona fide service categories with separate rates and service terms and conditions.[1013] The Notice also sought comment on the meaning of "geographic area."[1014] The Notice noted that "geographic area" could be interpreted to mean franchise area or the contiguous area served by a cable system.[1015] The Notice requested comment on the advantages and disadvantages of interpreting geographic area as synonymous with franchise area or as encompassing a greater area.[1016]

ii. Comments.

414. A substantial number of commenters, including cable operators,[1017] municipalities,[1018] and the Consumer Federation of America,[1019] the Community Antenna Television Association,[1020] and a joint comment from NATOA, League of Cities, the US Conference of Mayors and National Association of Counties,[1021] support giving cable operators some discretion to establish reasonable categories of service with separate rates

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[1012] Notice, 8 FCC Rcd at 534.

[1013] Notice, 8 FCC Rcd at 534.

[1014] Notice, 8 FCC Rcd at 535.

[1015] Notice, 8 FCC Rcd at 535.

[1016] Notice, 8 FCC Rcd at 535.

[1017] MCATC Comments at 36-38; CIC Comments at 88-89; AdelphiaII Comments at 120, 125-130; Nashoba Comments at 118, 131-132; Cox Comments at 84-85; Newhouse Comments at 44-47; Comcast Comments at 64; Blade Comments at 13; Time Warner Comments at 68-69; Carib Comments at 22; NCTA Comments at 77-79; TCI Comments at 60-63; Harron Comments at 10-11; Viacom Reply Comments at 14-15.

[1018] ThousandOaks Comments at 5; Palm Desert Comments at 13-14; New Bedford Comments at 7; CalCities Comments at 13-14; NYC Comments at 5-6.

[1019] CFA Comments at 159-160.

[1020] CATA Comments at 36-37.

[1021] NATOA Comments at 79-80.

and terms and conditions of service. Comments by Tele-Communications, Inc. and Harron Communications Corporation, and the Reply Comment by Continental Cablevision Inc. contend that uniformity of rate structures rather than rate levels was intended by the Act.[1022] These comments variously support vesting cable operators with discretion to negotiate individual contracts, offer promotional rates, impose line extension charges, establish bulk and commercial rates, and offer discounts to senior citizens, lower income households, the handicapped or other special groups.

415. Some commenters, however, claim that certain types of rate structures and/or special categories of customers should not be permitted. Twelve cities filed separate but similar comments opposing class discounts for senior citizens and other groups, individually negotiated contracts and bulk discounts unless the cable operator absorbs the cost difference for such discounts.[1023] The City of Miami Beach filed comments opposing differential offerings other than those discounts statutorily prescribed, including discounts for senior citizens, those with low incomes and the hearing impaired.[1024] Lorna Veraldi, a communications professor, filed extensive comments opposing bulk contracts as an anticompetitive form of predatory pricing, absent convincing evidence that they reflect savings in service and other costs.[1025] Certain commenters expressly opposed individually negotiated contracts but favored other non-uniform rates.[1026] The Wireless Cable Association International, Inc. opposes any discrimination based on whether a competitive alternative is available.[1027]

[1022] TCI Comments at 60-63; Harron Comments at 10-11; Continental Cablevision Reply Comments at 9; Time Warner Reply Comments at 52.

[1023] Paducah Comments at 28-29; Carson Comments at 28-29; McKinney Comments at 28-29; Parsippany Comments at 28-29; BowlingGreen Comments at 28-29; Key West Comments at 28-29; Drexel Comments at 28-29; New Bern Comments at 28-29; Conneaut Comments at 28-29; St. Petersburg Comments at 29-30; Williamston Comments at 28-29.

[1024] Miami Beach Comments at 21.

[1025] Veraldi Comments at 3-4, 7.

[1026] Hollywood Reply Comments at 9-10; Wireless Reply Comments at 6-7; Liberty Reply Comments at 4-6.

[1027] Wireless Comments at 2-5.

416. Several commenters generally supported giving cable operators the right to offer non-uniform rates, but added certain provisos to the cable operator's discretion. The League of California Cities[1028] noted that discounts should be part of the Basic Service Tier. Comments by the MCATC and reply comments by Liberty Cable Company asserted that special packages should be allowed where justified and reasonable, and that justification should be made part of the public record and the parties able to appeal to the Commission.[1029] Comments by Palm Desert, California further contended that group discounts for senior citizens or others must be available to all members of the group and subject to local regulation and governmental approval.[1030] Comments by the Mayor of the City of New Bedford, Massachusetts asserted that discounts for senior citizens and those with low incomes must be enforceable by the local franchising authorities, that the eligibility criteria should be clearly defined and that it should not be burdensome for the elderly or other groups to verify eligibility.[1031]

417. The majority of the commenters[1032] favor defining geographic area as franchise area, thus limiting the rate structure uniformity requirement of the statute to the franchise area.[1033] Several note that public policy and the legislative

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[1028] CalCities Comments at 13-14.

[1029] MCATC Comments at 37-38; Liberty Cable Company Reply Comments at 4-6.

[1030] Palm Desert Comments at 13-14.

[1031] New Bedford Comments at 7.

[1032] CIC Comments at 83, 86, Reply Comments at 55-57; Armstrong Comments at 33-34; MCATC Comments at 39-40; Cablevision Comments at 25; InterMedia Comments at 35; AdelphiaII Comments at 119-125; Nashoba Comments at 126-130; Cox Comments at 80-82; Comcast Comments at 64; Time Warner Comments at 70-74; Carib Comments at 23; Continental Comments at 58-63; NCTA Comments at 77-79; San Diego Comments at 2; CalCities Comments at 13-14; NYSCCT Comments at 9-10, 15-17; NATOA Comments at 79-80; GTE Comments at 12; Cole Comments at 45-48; Palm Desert Comments at 12; NAB Reply Comments at 24; Ventura Reply Comments at 6. ThousandOaks Comments at 5, however, support uniformity on the franchise area when topographically separated from other system franchises and/or its costs factors differ significantly from those of adjacent franchise areas.

[1033] Comments by Cole at 45-48 and the City of Mesa, Arizona at 4 question whether "franchise area" means the area licensed by the city for service or the actual service area. AdelphiaII, Reply

history of the Cable Act dictate such a definition,[1034] while others assert that costs vary by franchise area and that requiring system-wide uniformity would require low-cost franchises to subsidize higher cost ones.[1035] NYSCCT urged the Commission to require uniformity of basic rates on a franchise basis, but noted that the Commission should have the discretion to apply uniform rates to the entire cable system to determine reasonableness of rates and reduce administrative burdens.[1036] Several commenters noted that joint certification by affected franchising authorities would eliminate the chief problem with system-wide rate uniformity.[1037]

418. Two cable operators,[1038] eight municipalities,[1039] and the American Public Power Association[1040] filed comments in support of system-wide rate uniformity of standard services. Some commenters[1041] urge that geographic area should mean a contiguous area served by single headend while the American Public Power Association Reply Comments argued against this definition.[1042] The City of Glasgow argued that geographic area should be defined to include all cable systems operated by an MSO in a state.[1043]

Comments at 67, asserted that the area licensed rather than the actual service area was clearly contemplated. For purposes of this proceeding, "franchise area" is the area licensed for service.

[1034] See, e.g., CIC Comments at 83-87; Cox Comments at 80-82; Cole Comments at 45-48.

[1035] See, e.g., Comcast Comments at 64; Carib Comments at 23.

[1036] NYSCCT Comments at 9-10, 15-17.

[1037] See, e.g., Continental Comments at 58-63; Mesa Comments at 4.

[1038] Liberty Comments at 10; Newhouse Comments at 45 (uniformity on a system-wide basis but operator should be able to charge different rates between franchise areas if costs differ).

[1039] North Redington Comments at 2; New Bedford Comments at 7-8; Manitowoc Comments at 5; Miami Beach Comments at 20-21; Minn Comments at 23; Somerville Comments at 8; Bandon Comments at 1.

[1040] APPA Comments at 1-11; Reply Comments at 1-2.

473 See, e.g., Bandon Comments at 1.

[1042] APPA Reply Comments at 6-7.

[1043] Glasgow Comments at 4.

419. Some commenters suggested that cable operators be permitted to offer special rates categories to certain groups, e.g., commercial establishments and multiple dwelling buildings. Foe example, Cole argues that cable operators must be permitted to establish bona fide service categories with different rates. Cole specifically includes among these categories the hotel/motel industry with its seasonal and/or transient customers which, along with other commercial establishments, require "customized" commercial agreements between the cable operator and commercial establishment.[1044] Some franchising authorities argue that reasonable and non-discriminatory bulk discounts often offered by cable operators to multiple dwelling buildings should be permitted under Section 623(e), so long as all multiple dwelling buildings in the area have an opportunity to negotiate such contracts.[1045] However, several other local franchising authorities believe that such bulk discounts often result in price discrimination against individual subscribers.[1046] Cable operators generally agree that bulk discounts should be permitted because such discounts allow cable systems to meet competition from alternative providers such as SMATV and MMDS.[1047] Some alternative video programming providers argue that cable operators' bulk discounts to multiple dwelling buildings are often just a means of predatory pricing by cable operators to obstruct competition from alternative providers.[1048]

420. Some franchising authorities believe that Section 623(e) permits them to adopt anti-discriminating regulations that are consistent with the Cable Act and our implementing rules.[1049] However, cable companies caution that the provision must not be read so broadly as to allow franchising authorities to regulate cable service rates in any manner above and beyond that explicitly permitted under the Cable Act and our implementing rules.[1050]

[1044] Cole Comments at 48-49.

[1045] See generally NATOA Reply Comments at 28 n. 63; NYC Reply Comments at 5-7.

[1046] Se, e.g. Parsippany Comments at 28-29; Drexel Comments at 28-29; New Bern Comments at 28-29; Paducah Comments at 28-29.

[1047] See generally Falcon Comments at 70-73: Time Warner Comments at 74-75.

[1048] Liberty Comments at 4-8; Nationwide Comments at 3-4.

[1049] NATOA Reply Comments at 28 n.63.

[1050] Falcon Comments at 76; Time Warner Comments at 78.

iii. Discussion.

421. The comments received indicate that there are a number of related issues that we need to address relating to the implementation of Section 623(d). First, is this provision applicable only to rates that are otherwise subject to regulation or is it applicable more broadly to both regulated and unregulated services in both effectively competitive and noncompetitive franchise areas? The wording of the statute does not provide a specific answer to this question. Section 623(a)(2) generally provides that "[i]f the Commission finds that a cable system is subject to effective competition, the rates for the provision of cable service by such system shall not be subject to regulation by the Commission or by a State or franchising authority under this section." (Emphasis added). Other provisions of Section 623 also generally exempt "video programming offered on a per channel or per program basis" from either federal or state regulation. Nevertheless, the uniform rate provision itself contains no limiting provisions. The general thrust of the rate regulation provisions of the Act is that as the markets involved become more fully competitive, regulation specific to the cable industry may be reduced and general provisions of the law relating to anticompetitive conduct more heavily relied on. This suggests that Section 623(d)'s focus is properly on regulated services in regulated markets.

422. Second, as indicated in the Notice the term "geographic area" must be defined. It could be interpreted to mean either the franchise area of a system or the contiguous area served. We conclude that a system's franchise area properly defines that "geographic area" within which uniformity of rate structures is mandated. Section 623(d) reveals a congressional intent to impose limits on the ability of cable operators to offer service under different rate structures within a service territory. Moreover, the legislative history reveals that Congress intended the franchise area to be the scope of the service territory within which the statute intended to limit cable operator discretion.[1051] The statute also envisions generally that local franchising authorities may prohibit discrimination by cable operators against subscribers of cable service. We believe that Section 623(e), which we discuss more extensively below, generally envisions that local franchise authorities shall exercise some regulatory oversight on the

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[1051] See Senate Report at 76 ("...cable operators must offer uniform rates throughout the geographic area in which they provide cable service. This provision is intended to prevent cable operators from having different rate structures in different parts of one cable franchise. This provision is also intended to prevent cable operators from dropping the rates in one portion of a franchise area to undercut a competitor temporarily.")

categories of customers and service that the cable operator may establish within the franchise area. We believe that it would be an anomalous result to give a broad interpretation to geographic area, thus requiring, for example, that a rate structure must be uniform throughout a state or within a system, while at the same time investing local franchising authorities with some authority to determine the extent to which discrimination in rate structure may take place within the franchise area. A uniform rate structure requirement for an area larger than a franchise area could substantially limit local authorities' ability to exercise the power to prohibit discrimination. We do not believe that Congress intended this result. Accordingly, we conclude that for purposes of administration of Section 623(d), geographic area means franchise area. Thus, a cable operator is generally required by this provision to have a uniform rate structure within each franchise area.

423. Third, we need to address what is meant by the requirement that rate structures be uniform. May reasonable rate structures be allowed if uniformly applied to purchasers with the same class or must all subscribers be charged identical prices for identical service? The Act specifically mandates a uniform "rate structure." The legislative history does not reveal any congressional intent to mandate a uniform rate for all services and classes of customers. Indeed, Section 623(e) specifically contemplates special categories of customers may receive separate rates.[1052] Accordingly, we conclude that Section 623(d) does not preclude establishment of reasonable categories of customers and service by cable operators. Thus, for example, as suggested in the Notice, we do not believe that Congress intended a per se prohibition on differences in rates between seasonal and full-time subscribers. We also find that uniform, non-predatory bulk discounts to multiple dwelling units, including apartment buildings, hotels, condominium associations, hospitals, universities, and trailer parks, could form a valid basis for distinctions among subscribers. Introductory or promotional rates universally applied at a given time but subsequently discontinued would also not be prohibited. And, as is suggested by Section 623(e), discussed further below, reasonable discounts may be made to senior citizens or other economically disadvantaged groups and charges may be set to facilitate the reception of service by hearing impaired individuals. As we have previously discussed in our tier "buy-through" proceeding, technological differences in the service offered within a

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[1052] The Act permits cable operators to offer "reasonable discounts to senior citizens or other economically disadvantaged group discounts" and also allows cable operators to require and regulate "the installation or rental of equipment which facilitates the reception of cable service by hearing impaired individuals. Communications Act § 623(e), 47 U.S.C. § 543(e).

geographic area, such as might result from the staged rebuilding of a system, would also not conflict with this provision.[1053]

424. Liberty, an alternative video programming provider, asserts that cable systems often offer bulk discounts to individual multiple dwelling buildings for the sole purpose of thwarting potential competition from alternative providers.[1054] Moreover, some local franchising authorities argue that cable companies' bulk discounts to condominiums should be prohibited because this pricing scheme discriminates against ordinary subscribers who are unable to bargain with the cable operator for a volume discount.[1055] We are concerned that bulk discounts not be abused as a means of displacing alternative multichannel video distributers from multiple dwelling units, which have become important foothills for the establishment of competition to incumbent cable systems. However, we also are mindful that all multichannel distributors can realize significant efficiencies and cost savings by service multiple dwelling units and other high-occupancy buildings, and we do not wish to foreclose the prospect that those savings might be passed on to consumers in those dwellings. Therefore, we agree with NATOA that such discounts may be permitted,[1056] if they pass on cost savings of volume offerings to the subscribers affected. Because of our concerns about abuse, however, we establish the following conditions on such bulk offerings. First, all multiple dwelling buildings in the franchise area must receive the same bulk discount rate structure. Second, the operator must be able to demonstrate that he/she derives some economic benefit from providing the bulk rate discount.[1057] We believe that permitting such discounts will foster competition among video providers, furthering an objective of the Act.[1058] In addition, our

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[1053] See Report and Order, MM Docket No. 92-262, FCC 93-143 (released April 1, 1993), note 17.

[1054] Liberty Comments at 4-8. See also Nationwide Comments at 3-4.

[1055] Parsippany Comments at 28-29. See also McKinney Comments at 28-29; Drexel Comments at 28-29; New Bern Comments at 28-29.

[1056] NATOA Reply at 28 n.63.

[1057] Cf. Implementation of Sections 12 and 19 of the Cable Television Consumer Protection and Competition Act of 1992, Development of Competition and Diversity in Video Programming Distribution and Carriage, MM Docket No. 92-265, First Report and Order, at para. 108 (adopted April 1, 1993; released April __, 1993) (discussing volume justification for price differentials).

[1058] See e.g., Cable Act § 2(b)(2).

substantive rate standards will ensure that other customers' rates will remain reasonable.

425. Finally, we agree with NATOA that Section 623 of the Cable Act grants certified franchising authorities the opportunity to regulate basic cable services, including any special rate categories such as bulk discounts.[1059] We also believe, however, that Section 623 must not be read so broadly as to permit franchising authorities to deviate from the principles articulated here with respect to those rate categories discussed below relating to senior citizens and disadvantaged group discounts and with service to the hearing impaired.[1060]

b. Discrimination

i. Background

426. Section 623(e) of the 1992 Cable Act states that no Federal agency, State or local franchising authority may be prohibited from:

> (1) Prohibiting discrimination among subscribers and potential subscribers to cable service, except that no [such] authority may prohibit a cable operator from offering reasonable discounts to senior citizens or other economically disadvantaged group; or
> (2) requiring and regulating the installation or rental of equipment which facilitates the reception of cable service by hearing impaired individuals.[1061]

The Notice tentatively concluded that we should explicitly permit the discounts contemplated in Section 623(e)(1), and permit local authorities to adopt anti-discrimination provisions consistent with the Cable Act and our implementing regulations. We sought comment on what economically disadvantaged groups other than senior citizens may be awarded reasonable discounts by operators pursuant to Section 623(e)(2). We also sought comment on whether to permit cable companies to charge different rates to different categories of customers based on differences in costs of providing service. Finally, we observed that Section 623(e)(2) does not preclude State or local authorities from adopting regulations concerning installation of equipment for the hearing impaired that are consistent with other provision of the Cable

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[1059] NATOA Reply Comments at 2,8 n.63.

[1060] See generally Falcon Comments at 76-77. See also Time Warner Comments at 78.

[1061] Communications Act, § 623(e), 47 U.S.C. § 543(e).

Act. We sought comment on whether it would be necessary to adopt specific rules concerning such equipment at this time.[1062]

ii. **Comments**

427. We received numerous comments supporting separate rate categories for senior citizens and/or the economically disadvantaged.[1063] Somerville, for example, believes that the Commission should establish a definition regarding who is economically disadvantaged and should ensure that the cable operator does not make it burdensome for members of such groups to avail themselves of discounts.[1064] NATOA believes that the Commission should refrain from establishing a federal definition of "economically disadvantaged" because such status may vary from region to region.[1065] On the other hand, Parsippany opposes lower rate categories for senior citizens and the economically disadvantaged, arguing that their service costs the same as service to all other groups and that remaining subscribers should not have to subsidize their lower rates.[1066]

428. Nationwide argues that separate rate categories should be limited to those specified in Section 623(e) -- to senior citizens and/or economically disadvantaged groups. Nationwide believes that creating numerous rate categories would undermine the statutory goal of preventing rate discrimination and enable the cable operator to inflate rates in one category in order to subsidize lower rates in another category that might be subject to competition.[1067]

429. Finally, commenters generally agree that Section 623(e) permits local franchising authorities to regulate the installation and offering of equipment for reception of cable service by the hearing impaired.[1068] In addition, NCI notes that

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[1062] Notice, 8 FCC Rcd at 535.

[1063] See, e.g., Palm Comments at 13; Somerville Comments at 7; Falcon Comments at 76-77.

[1064] Somerville Comments at 7.

[1065] NATOA Comments at 80.

[1066] Parsippany Comments at 28.

[1067] Nationwide Comments at 6-7.

[1068] Time Warner Comments at 78; Falcon Comments at 76; NCI Comments at 2.

the legislative history endorses increased close-captioning of cable programming.[1069]

iii. Discussion

430. As proposed in the Notice and as many commenters urge, we will specifically permit reasonable discounts for senior citizens and other economically disadvantaged groups. We define members of other economically disadvantaged groups as individuals who receive federal, state or local welfare assistance.[1070] Cable operators will also have the discretion to create subcategories of economically disadvantaged individuals, so as to limit the scope of discounts that may be available, if a rational basis exists for such subclassification.[1071] As discussed above, we construe the uniform rate structure requirements of Section 623(d) to permit establishment of reasonable categories of service by cable operators.[1072] The discounts permitted under Section 623(e) for senior citizens and other economically disadvantaged groups are consistent with our previous discussion. They must be offered equally to all those who qualify as members of these categories, or reasonable subcategories of them. A local franchising authority or other governmental entity may not prohibit cable systems from offering reasonable discounts to all senior citizens or members of economically disadvantaged groups in the franchise area.

431. We also believe that the "discrimination" which Section 623(e) entitles federal, state and local authorities to prohibit does not include reasonable categories of subscribers based on justifiable differences in the economic benefits the

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[1069] NCI Comments at 2 (citing House Report at 93).

[1070] Examples of such assistance at the federal level would be Supplemental Security Income (SSI) or Aid to Families with Dependant Children (AFDC). We believe that this definition will permit cable operators and franchise authorities the flexibility to take into account regional and economic differences. See generally NATOA Comments at 80.

[1071] As discussed supra Section II.A.3.c.(1)(d), a cable operator may offer only a single basic service tier. Therefore, an operator may not offer an inexpensive "lifeline" tier consisting of fewer channels than the operator's basic tier.

[1072] Section 623(d) states that a cable operator shall have a rate structure for the provision of cable service that is uniform throughout the geographic area in which cable service is provided over its cable system. Communications Act, § 623(d), 47 U.S.C. §543(d).

operator derives from serving such categories. As stated in supra Section II.A.5.c, the local franchising authority and the Commission will address the reasonableness of such categories as the need arises in concrete situations.

432. We agree with those commenting on the issue that Section 623(e) permits governmental authorities to regulate the installation and offering of equipment for the hearing impaired.[1073] NCI observes that the legislative history of the 1992 Cable Act indicates that the percentage of closed-captioned programs carried by cable is well below that of traditional broadcasters.[1074] Accordingly, the Commission strongly encourages cable operators to carry more closed-captioned video programming. Franchising authorities are free to adopt specific regulations regarding the installation and offering of equipment for reception of cable service by the hearing impaired. In the absence of any record evidence indicating that federal intervention in this area is necessary, we decline to adopt specific closed-captioning rules for cable at this time.

c. Negative Option Billing

i. Background

433. Section 623(f) of the Cable Act provides that an operator may not charge a subscriber for "any service or equipment that the subscriber has not affirmatively requested by name."[1075] The Notice tentatively concluded that an affirmative request for service or equipment may occur orally or in writing, so that the subscriber has flexibility to order by either method. We also tentatively concluded that an operator should not be permitted to charge for any service or equipment that would be in violation of Section 623(f) of the Act or the Commission's implementing rules, and sought comment on other enforcement questions.[1076]

434. The legislative history states that Section 623(f) does not apply to "changes in the mix of programming services that are included in various tiers of cable service."[1077] The Notice thus sought comment on the types of

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[1073] See e.g. Time Warner Comments at 78; Falcon Comments at 76.

[1074] NCI Comments at 2 (citing House Report at 93).

[1075] Communications Act, § 623(f), 47 U.S.C. § 543(f).

[1076] Notice, 8 FCC Rcd at 535, para. 119.

[1077] Conference Report at 65.

tier changes and equipment upgrades that may be made without violating the negative option billing restriction. The Commission also sought comment on how this provision should apply to initial implementation of the basic cable service rate structure.[1078]

ii. Comments

435. Most parties agree with the tentative conclusion in the Notice that an affirmative request for service by a subscriber may be made orally or in writing.[1079] NATOA agrees with the tentative conclusion in the Notice that an operator should not be permitted to charge for service or equipment in violation of Section 623(f) of the Act and of the Commission's implementing rules. NATOA argues that in such case the operator must refund any amounts collected.[1080]

436. Cable interests would generally exclude from the scope of the negative option billing provision changes in tier composition[1081] and equipment upgrades,[1082] even when these are accompanied by price increases.[1083] Cable interests would also exclude initial retiering on the part of cable companies appropriate for implementation of the Act's rate structure.[1084] MCATC would subject to the provision a service package substantially different from that previously provided to subscribers at an additional cost, but exclude minor tier changes

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[1078] Notice, 8 FCC Rcd at 536, paras. 120, 121.

[1079] Notice, 8 FCC Rcd at 535, para. 119; Continental Comments at 69-70; Cox Comments at 90; CIC Comments at 96; NATOA Comments at 85; Miami Comments at 21; NMCC Comments at 5.

[1080] Notice, 8 FCC Rcd at 535, para. 119; NATOA Comments at 85.

[1081] See, e.g., Comcast Comments at 65; Adelphia II Reply at 73; NCTA Comments at 80; Armstrong Comments at 34; Intermedia Comments at 35. See also TCI Comments at 66-67 (revenue-neutral unbundling, retiering and repackaging of services and equipment not within scope of negative option billing provision); Cole Reply at 35 (revenue-neutral changes in programming in a tier should be exempt from negative option billing rules).

[1082] See, e.g., Cole Comments at 52-53.

[1083] See, e.g., Falcon Comments at 80-81; CSC Comments at 18-19; Cox Comments at 91; CIC Comments at 96. See also Encore Comments at 20-21.

[1084] See, e.g., TCI Comments at 65-66; Cole Comments at 52-53; Falcon Comments at 80-81.

and "normal" price increases.[1085] Some cities and consumer groups take a more restrictive approach, however.[1086] CFA would subject any changes in service accompanied by price changes to the negative option billing provision.[1087] Some municipalities argue that revenue neutrality should not be the test, because an operator could simply move a channel to a deregulated tier and later raise the price.[1088] If, in initial implementation, a cable operator splits its basic service into a new basic and an expanded basic and increases the price, CFA would apply the negative option billing provision so that subscribers could not be automatically billed for expanded basic.[1089]

437. CFA and Massachusetts endorse the proposal in the Notice to require 30-days notice for tier changes or equipment upgrades accompanied by a price increase.[1090] Minnesota believes that if a service or equipment is eliminated, subscribers must receive at least 90 days notice of tiering changes.[1091]

iii. Discussion

438. We find that, under the 1992 Cable Act, to be billed for any cable service a subscriber must affirmatively request such service. Such requests can be made orally or in

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[1085] MCATC Comments at 29-31.

[1086] See, e.g., Miami Comments at 21; See also NATOA Comments at 85-86 (provision should apply if subscriber has to pay more for the same programming because it was divided on two tiers, or operator creates two tiers and forces subscribers to take the more expensive tier).

[1087] CFA Comments at 158; CFA Reply at 83-53.

[1088] Austin Comments at 69-70 (citing case in Gillette, Wyoming, where operator moved subscribers from regulated basic to expanded, but deregulated, basic for same price, but where rates could later rise without regulatory scrutiny).

[1089] CFA Comments at 159.

[1090] Notice, 8 FCC Rcd at 536, para. 120; MCATC at 34 (provided price increase justified under our rules); CFA Comments at 159 (also arguing change should be subject to negative option billing, however). See also Austin Comments at 71.

[1091] Minnesota Comments at 24.

writing.[1092] We also agree with the consensus in the record that an operator should not be permitted to charge for any service or equipment provided in violation of Section 623(f) of the Act and the Commission's implementing rules.

439. As suggested in the Notice,[1093] issues arising under the negative option billing provision may often be contractual in nature, and capable of being redressed in the local courts. For example, subscribers charged in violation of the statute and our rules would not have to pay the illegal charge. Should the operator believe the charge is permissible, the onus would be on it to attempt to collect through the judicial process. However, our existing procedures would also be available in cases involving, for example, interpretation of our rules or definitions, that would be more easily and appropriately resolved by the Commission as an expert agency.[1094] In either case, our forfeiture provisions would apply to violations of Section 623 (f) or our negative option billing rules and could be used to help deter or correct any patterns of violation of these rules.[1095]

440. The statutory language on negative option billing applies to "any service or equipment."[1096] The legislative history, however, clarifies that Section 623(f) does not apply to changes in the mix of programming in a tier.[1097] We conclude

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[1092] This will permit subscribers accustomed to being able to change or order service over the telephone to continue to make such oral service requests. We clarify, at Lenfest's request, that affirmative subscriber requests made electronically, (e.g. Audio Response Units or Automatic Number Identification, used for pay-per-view and premium channels), are considered affirmative requests. Lenfest Comments at 9.

[1093] Notice, 8 FCC Rcd at 535, para. 119.

[1094] See, e.g., 47 C.F.R. Part 1 (Practice and Procedure); 47 C.F.R. § 76.7 (cable special relief procedures).

[1095] 47 U.S.C. § 503 (b)(2) and (6)(B). Some municipalities argue that state and local governments should have concurrent enforcement powers over negative option billing practices. Austin Comments at 71-72. We do not preclude state and local authorities from adopting rules or taking enforcement action relating to basic services or associated equipment consistent with the implementing rules we adopt and their powers under state law to impose penalties.

[1096] Communications Act, § 623 (f); 47 U.S.C. § 543 (f).

[1097] Conference Report at 65.

that the provision applies to additions of a new tier of service or a new single channel service without the affirmative assent of a subscriber. We believe that subscribers would expect to be able to veto on an individual basis such significant changes in service before they actually receive such programming.[1098] However, as Congress intended, and many commenters urge,[1099] a change in the mix of channels in a tier, including additions or deletions of channels, will not be subject to the negative option billing provision, unless they change the fundamental nature of the tier.[1100] We agree with CSC that operators need this flexibility to modify and upgrade their offerings in response to marketplace changes.[1101] Moreover, we do not believe that consumers necessarily expect the mix and range of services in a tier to remain static. Thus, on balance, we conclude that the consumer benefits from giving operators the ability to diversify, improve or otherwise modify their offerings in a tier outweighs the slight reduction in consumer choice that would result from exempting such changes from the negative option billing requirements. We also observe that if we subjected relatively minor tier changes to the scope of the provision, subscribers might well perceive the need to resubscribe each time such a change occurred as a burden, rather than a benefit. Moreover, any actual or implicit[1102] change in price accompanying programming changes would be subject to our rate regulations -- to basic rate review at the local level and to review of cable programming service complaints at the FCC. We do not believe it necessary, as CFA suggests,[1103] also to subject any service changes accompanied by a price increase to negative option

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[1098] Cf. MCATC Comments at 29 (Massachusetts rule is that cable operator might obtain subscriber's consent prior to providing subscriber service package substantially different from that previously provided to the subscriber at an additional cost).

[1099] Comcast Comments at 65; MCATC Comments at 30-31; Armstrong Comments at 34; Intermedia Comments at 35.

[1100] For example, if an operator deleted all existing channels from a particular tier and added a completely new set of channels, we believe that the fundamental nature of that tier would have changed and subscribers would have to affirmatively assent before being billed for the reconstituted tier.

[1101] CSC Comments at 18.

[1102] Deletion of a channel might mean rates for a tier would have to be reduced under our rate regulations.

[1103] CFA Comments at 158. See also Miami Comments at 21.

billing requirements.[1104] We note that our customer service rules require operators to give subscribers 30-days advance notice of any changes in rates, programming or channel positions. We do not believe subscribers also need the additional protection of the negative option billing provision for every proposed rate increase, unless a price change accompanies a fundamental change in service, such as the addition of a tier.

441. Moreover, restructuring of tiers and equipment, including restructuring appropriate for implementing the Cable Act's provisions, will not bring the negative option billing provision into play if subscribers will continue to receive the same number of channels and the same equipment.[1105] As NCTA suggests, a subscriber presumably has already "affirmatively

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[1104] See, e.g., NCTA Reply at 72; Time Warner Reply at 57.

[1105] Cf. Adelphia II Reply at 73 (rearranging of services to a second tier without introduction of new services not negative option); Time Warner Comments at 79 (retiering to comply with Act); Intermedia Comments at 35 (retiering required to implement provisions of Act); MCATC Comments at 32 (splitting basic tier into two tiers that add up to the same service previously offered); CSC Comments at 52-53 (maintaining service to expanded basic subscribers notwithstanding creation of lower-cost basic). See generally TCI Comments at 66-67 (whether change in price for converter/remote from $4/1 to $3/2 is revenue neutral).

We do not believe that Austin's objection to this approach -- that a revenue-neutral change may nevertheless result in programming being switched to a deregulated tier -- poses a significant issue under the regulatory framework of the Act. Austin Comments at 10. Under the Cable Act, only programming sold on a per-channel or per-program basis is entirely deregulated. Thus, an operator would have to move a "tier" channel to "premium" status to escape regulation entirely. Based on our knowledge of industry practice to date, we doubt such changes will occur frequently. We also disagree with Austin that if a channel is moved from a basic to a non-basic tier, it should continue to be regulated as a basic service. Austin Comments at 71. The Act creates a regulatory framework, which subjects basic service to local regulation and all other services, except premium channels, to federal regulation. We do not believe that movement of a channel from a tier subject to local scrutiny to one subject to federal scrutiny should be constrained, particularly in light of the parallel rate regulations we adopt for basic and cable programming services. We also do not believe that anything in the Act requires us to restrict movement of a channel to premium and deregulated status. See also Section II.A.(5)(e), infra (Evasions).

requested" this level of service.[1106] However, as with other changes in the mix of programming services, restructuring will be subject to the negative option billing provision, if the restructuring effects a fundamental change in the nature of the service subscribers receive. We agree with Time Warner that retiering accompanied by a price increase is likely to be subject to rate regulation scrutiny.[1107]

442. The Notice tentatively concluded that the negative option billing provision does not apply where system-wide equipment improvements are accompanied by justified rate increases. Cable operators generally agree that they should be able to make equipment upgrades free of the restrictions of the negative option billing provision, but disagree that accompanying rate increases are relevant to determining whether such changes are within the scope of the statute.[1108] We believe that requiring operators to contact subscribers before making equipment improvements and securing their assent might deter beneficial upgrades[1109] and undermine one of the underlying policies of the Act, to "ensure that cable operators continue to expand, where economically justified, their capacity."[1110] Our rate regulations will apply to any price increases accompanying such equipment changes. We do not believe it is necessary to also bring the issue of the validity of such a rate increase within the scope of the negative option billing provision.

d. Collection of Information.

i. Background.

443. The statute requires cable operators to file annually with the Commission or franchising authorities, as appropriate, beginning one year from the date of enactment, such financial information as is necessary to administer and enforce rate regulation.[1111] The Notice proposed to annually collect

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[1106] NCTA Comments at 81.

[1107] Time Warner Reply at 59.

[1108] Notice, 8 FCC Rcd at 536, para. 120; CSC Comments at 19; NCTA Comments at 80; Nashoba Comments at 137-138; Time Warner Comments at 82. See also Continental Comments at 69-70; Falcon Comments at 80-81; Cox Comments at 91; CIC Comments at 96.

[1109] CSC Comments at 19.

[1110] Cable Act, § 2(b)(3).

478 Communications Act, Section 623(g), 47 U.S.C. Section 643(g).

certain financial information specified in Appendix C as well as the information collected by the Commission in the Order, MM Docket No. 92-266, FCC 92-545, adopted December 10, 1992. The Notice noted that the information regulators would need to assure they can effectively administer and enforce the requirements of Section 623 will ultimately depend on the regulatory alternative selected for implementing rate regulation of cable service. It stated an intention to further tailor the collection of information to the method of implementing Section 623 ultimately adopted.[1112] Specifically, the Notice solicited comment on the appropriate scope of the information to be collected, whether all systems should be required to file the report, and what filing requirements should be placed on systems with 1000 or fewer subscribers.[1113]

ii. Comments.

444. Commenters generally favored per system filing[1114] on an annual basis.[1115] Most of the commenters favored mandatory filing by all cable operators,[1116] though a few favored imposing the requirement on a sampling of systems[1117] and others requested that public companies be exempt from the filing requirements.[1118] The National Telephone Cooperative Association argued strongly in support of an exemption for small cable systems,[1119] but comments filed by the Satellite Dealers Association noted that while an exemption for small systems may be appropriate, requiring all operators to submit information

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479 Notice, 8 FCC Rcd at 536.

480 Notice, 8 FCC Rcd at 536.

[1114] Adelphia Comments at 153-154; Nashoba Comments at 150; Newhouse Comments at 49; Time Warner Comments at 86.

[1115] SSO Comments at VI-VII; NATOA Comments at 81-82. Comments filed by Minn at 25, however, asserts that the Commission should not require annual filings, but should file relevant financial information upon request of franchising authorities.

[1116] See, e.g., Municipal Comments at page VI-VII; NATOA Comments at 81-82.

[1117] See, e.g., Comcast Comments at 64.

[1118] Time Warner Comments at 87; Adelphia Comments at 154; Nashoba Comments at 150.

[1119] NTCA Comments at 4.

would be most beneficial.[1120] Several commenters requested that a single form be used to avoid confusion concerning the information required.[1121] The National Association of Regulatory Utilities Commissioners urged the Commission to collect information in electronic form and make it publicly available on a computer-accessible dial-up data base.[1122]

445. Cable operators generally urged the Commission to narrowly tailor filing requirements so that only information necessary to administer and enforce rate regulation would be required,[1123] while other commenters argued that the Commission should require operators to provide adequate financial information based on the system's operation in that municipality.[1124] Some of the commenters argued that the information solicited in the December Public Notice[1125] was sufficient[1126] while others sought additional information.[1127] Several commenters requested that cost data not be required[1128] while others urged the Commission to seek broad financial information including cost data.[1129] Comments filed by Media General and Continental Cablevision[1130] offered an extensive

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[1120] SDA Comments at 15.

[1121] Adelphia Comments at 154; Nashoba Comments at 150; Newhouse Comments at 50.

[1122] NARUC Comments at 5-6.

[1123] Adelphia Comments at 153, Reply at 85-86; Nashoba Comments at 149; Carib Comments at 25; Newhouse Comments at 48.

[1124] See, e.g., New Bedford Comments at 7; Bayonne Reply Comments at 10.

[1125] Order, MM Docket No. 92-266, FCC 92-545 (adopted December 10, 199)2.

[1126] Adelphia Comments at 153; Nashoba Comments at 149; Newhouse Comments at 48-49.

[1127] See, e.g., Fairfax County Reply Comments at 21-22.

[1128] Adelphia Comments at 152, Reply at 85-86. Nashoba Comments at 149; Newhouse Comments at 48; Time Warner Comments at 85.

[1129] Municipal Comments at page VI-VII; Miami Beach Comments at 19; NATOA Comments at 61-63.

[1130] Media General Comments at 4; Continental Comments at Appendix A.

critique of the financial filing requirements proposed in the Notice. Some commenters objected to mandatory filing of any confidential and proprietary information and sought protections for any filed.[1131] Certain commenters argued that the Commission should delay decision on the filing requirements until conclusion of the instant proceeding.[1132]

iii. Discussion

446. The statute envisions that within one year of its enactment cable operators will file with the Commission financial information necessary for the enforcement and administration of the statute.[1133] In the Order, we directed a random sample of cable systems to submit certain rate and other information to aid in fashioning benchmarks. We have concluded that the filing of this information meets the statutory requirement that cable operators file within one year of enactment financial information necessary to administer and enforce the statute. Accordingly, it is not necessary to immediately adopt additional collection of information requirements in order to meet statutory requirements.

447. Moreover, in a Second Further Notice to be adopted shortly, we will explore further what cost-of-service standards we should adopt to govern showings by cable operators seeking to raise rates above capped levels. Cost-of-service showings could be facilitated if requirements concerning collection of information from cable operators on an ongoing basis are tailored at least to some extent to the information that would be required in cost-of-service showings. Accordingly, we have determined to further consider in that rulemaking the adoption of final information collection requirements.

e. Prevention of Evasions

i. Background

448. The Cable Act requires that the Commission establish and periodically review regulations to prevent evasion of its cable rate regulations, including evasions resulting from retiering.[1134] The Notice proposed to prohibit evasions in

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[1131] Miami Beach Comments at 19; Carib Comments at 25; Newhouse Comments at 48; Jones Intercable Reply Comments at 26-27; Disney Channel Reply Comments at 3.

[1132] Newhouse Comments at 50; Time Warner Comments at 87, Reply Comments at 63; Adelphia Comments at 155; Nashoba Comments at 150.

[1133] See Communications Act, § 623(g), 47 U.S.C. §643(g).

[1134] Communications Act, § 623(h), 47 U.S.C. § 543(h).

general, and to use rate regulation procedures to redress evasions of rate regulations. The Notice further proposed to review our evasion rules as an initial matter two years after they become effective, and thereafter every three years. We also solicited comment on how to reconcile the evasion provisions with the restructuring of services that the Cable Act permits, and indeed appears to require in some cases.[1135] The Notice proposed to except from the scope of the evasion provision "retiering necessary to comply with basic tier requirements, retiering that did not change the ultimate price for the same mix of channels in issue to the subscriber, or retiering accompanied by a price change that complied with our rate regulations."[1136]

ii. Comments

449. Cable operators generally maintain that retiering is not a per se evasion of our rate regulations.[1137] Some contend that not only does the Cable Act fail to prohibit such retiering, it may even require retiering to permit operators to make adjustments to the new regulations.[1138] Municipalities, however, tend to view retiering as potentially evasive.[1139] They argue, for example, that the Act does not require retiering.[1140]

[1135] Notice, 8 FCC Rcd at 537, paras. 126-127.

[1136] Notice, 8 FCC Rcd at 537, para. 127.

[1137] See, e.g., Falcon Comments at 82-83; NCTA Comments at 81; Time Warner Comments at 89; Time Warner Reply at 67-68; Armstrong Comments at 35; Intermedia Comments at 36-37; NYSCCT Comments at 27; CSC Comments at 21; Nashoba Comments at 141; Adelphia II Reply Comments at 11. CSC asks us to affirm that an operator can continue to retier without prior approval of the franchising authority so long as the franchise permits such a change. CSC Comments at 20.

[1138] See, e.g., Nashoba Comments at 141; NYSCCT Comments at 27; Adelphia II Reply Comments at 11-13, 17; Time Warner Reply Comments at 66-68; Newhouse Reply Comments at 3-4. Cole observes that tiering flexibility is essential to maintaining a low-cost basic service.

[1139] See, e.g. NATOA Comments at 83-84 (operator should have burden of showing by a preponderance of the evidence that challenged action was for legitimate business purpose). But e.g. Austin Comments at 73-74 (listing specific categories of actions to be deemed evasive).

[1140] Baltimore Reply Comments at 8-9, 14; Austin Comments at 74 (the Cable Act does not require retiering, and cable operators are using this argument as an excuse to evade rate regulation).

Some express concern that operators have used or will use retiering to move channels out of the basic tier to a less regulated tier, thus avoiding local rate regulation.[1141] CFA argues that unless prohibited from so doing, cable operators will move their most popular programming off the basic tier to a less regulated higher tier, forcing consumers to take a higher-priced tier to obtain the programming.[1142] Municipalities would also scrutinize for possible evasions retiering and repricing occurring after the enactment of the Cable Act on October 5, 1992, and before the effective date of the Commission's cable rate regulations.[1143] Cable interests disagree[1144] arguing, for example, that the evasion provision does not become effective until April 3, 1993,[1145] and that the Act, as manifested in the anti-buy through clause and congressional intent, requires preparatory retiering to establish a new low cost basic service.[1146]

450. Many cable interests agree, in general, with the proposal in the Notice to except from the scope of the evasion provision retiering necessary to comply with the Act, that does not change the mix of channels, or is accompanied by a justified price increase.[1147] Some suggest that the provision covers

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[1141] Muskegon Comments at 6; Denison Comments at 1; Sioux Comments at 1; NATOA Reply Comments at 31-33; Bowling Green Reply Comments at 1-8; Michigan Cities Reply Comments at 7-8; Baltimore Reply at 17.

[1142] CFA Reply at 35-36.

[1143] See, e.g., Bowling Green Reply at 1-8; Rapids Reply at 7-8; NYC Reply at 5; NATOA Comments at 82-83. See also Austin Comments at 73; Denison Comments at 2; Minn Comments at 25-26 (the Commission should ignore any retiering which took place after October 5, 1992, and consider services moved out of the basic tier during that timeframe as basic services subject to rate regulation); Rapids Reply at 7-8 (to prevent evasions, regulators should have the authority to reduce existing rates and order refunds of any unreasonable rates charged from October 5, 1992, and beyond).

[1144] See, e.g., NCTA Reply at 73; Newhouse Reply at i, 3-4; Time Warner Reply at 68.

[1145] Cole Reply Comments at 36.

[1146] TCI Reply at 68-70.

[1147] See, e.g., Armstrong Comments at 35; Intermedia Comments at 36, CSC Comments at 21. But See NATOA Reply Comments at 31-33 (all retiering is an attempted evasion).

retiering which represents an implicit price increase,[1148] for example, when service is decreased and the price is unchanged or only slightly decreased.[1149] Several cable operators express concern about excepting retiering that represents the "same mix of channels" as proposed in the Notice. They argue that "mix" should be interpreted to mean the same number of channels, to avoid the Commission's making programming content judgments.[1150] Austin states that the following should be included in our description of evasion practices: A decrease in programming services without an accompanying decrease in rates, a decrease in the quality of customer services without a decrease in rates, omitting to report revenues, improper cost shifting between systems, and retiering to avoid rate regulation.[1151] NATOA believes that we should not attempt to list all evasive practices. However, it believes that the following should be scrutinized as a potential evasion: any retiering or price increases implemented since the effective date of the Act, and charging for installation and equipment where such services were previously free. NATOA believes that the operator should bear the burden of proving by a preponderance of evidence that the alleged evasion was for a legitimate business purpose, other than for increasing revenue.[1152] Most of those commenting on the issue agreed with the suggestion in the Notice that a parallel rate scheme for basic and for non-basic regulated services might discourage cable operators from evasive retiering.[1153]

[1148] Falcon Comments at 82-83.

[1149] Time Warner Comments at 91-92. See also Cole Reply at 35-36. Cole argues matter decrease in the number of tier channels could be rate event, triggering a right for dissatisfied subscribers to appeal tier rates to the Commission. Cole Comments at 55, Time-Warner Reply Comments at 64-68 (example of retiering which involve attempted evasion, such as removing service from a tier, without a corresponding reduction in rate, which pushes the per channel fee above the benchmark per channel fee. However, if a cable operator retains the same level of service, but raises the rate, the increase is subject to regulation and cannot therefore be considered an evasion).

[1150] See, e.g., Falcon Comments at 84-85; Nashoba Comments at 142-143; Time Warner Comments at 89-92.

[1151] Austin Comments at 73.

[1152] NATOA Comments at 83-84.

[1153] Notice, 8 FCC Rcd at 537, para. 127. See, e.g., Connecticut Comments at 10; CFA Comments at 112; NATOA Comments at 85; NATOA Reply at 19-20 and fn. 20.

iii. Discussion

451. We define a prohibited evasion as any practice or action which avoids the rate regulation provisions of the Act or our rules contrary to the intent of the Act or its underlying policies. The rules we are adopting, including in particular the initial rate freeze as the transition to regulation is accomplished, parallel substantive standards for basic tier and cable programming service tiers, and cost based equipment regulations, are all intended, consistent with the mandate of Section 623(h), to address potential evasions, including those that might result from retiering of services. We agree with NATOA, however, that might not be possible to specifically list at the outset all types of potentially evasive practices.[1154] By definition, an evasion is an act attempting to elude scrutiny. Congress contemplated that, as regulation developed, different types of evasive behavior would be likely to evolve.[1155] It thus provided that we should periodically review and revise our regulations on evasion.[1156] As we proposed, we will review our rules two years from their effective date, and every three years thereafter, unless circumstances indicate more or less frequent reviews would be in the public interest.[1157]

452. Franchising authorities and subscribers may address specific instances of evasive behavior in rate regulation proceedings. As NATOA suggests, the operator will have the burden of demonstrating in such cases that the alleged evasion actually was primarily for a legitimate business purpose and not

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[1154] NATOA Comments at 83-84.

[1155] Thus, beyond the rules adopted, we will not attempt to adopt a specific list of prohibited "evasive" actions but will deal with such issues on a case-by-case basis.

[1156] Communications Act, § 623 (h), 47 U.S.C. § 543 (h).

[1157] Notice, 8 FCC Rcd at 537, para. 126. We agree with CFA that the Act obligates us to prevent evasions on an on-going basis. CFA Comments at 112 & n 95. We provide for enforcement mechanisms to carry out this responsibility. However, as a practical and legal matter we cannot and do not conduct rulemakings to change our rules in response to new evasive behaviors on an ongoing basis. Although CFA is unclear on this last point, to the extent it contends that we conduct formal proceedings on an ongoing, open-ended basis, we disagree and decline to do so. We do agree, however, that we will enforce the evasion prohibition continuously on a complaint basis and will adjust our definition and scrutiny of evasions as part of that ongoing process.

simply to evade rate regulation.[1158] This provision for ongoing enforcement, together with our commitment to periodic reviews of our rules one evasions, provides assurance that we will be able to stem any new evasion practices that might arise.

453. However, in order to provide some guidance to the public, franchising authorities, and the industry regarding our interpretation of the Act and our implementing regulations, we address certain practices which have been questioned as evasive behavior in this proceeding. We clarify that all retiering is not potentially evasive. As we stated in the Notice, some operators may have retier to comply with the Act's requirements regarding, for example, the composition of the basic service tier.[1159] Such retiering is not an evasion. Moreover, as many commenters have urged, we have adopted parallel rate regulation for both the basic and cable programming service tiers.[1160] Thus, in the absence of extraordinary circumstances, we do not perceive that operators will have any monetary incentive to shift channels from basic to cable programming service, to the detriment of subscribers.[1161] In addition, operator flexibility to retier is essential to permit needed system improvements. Thus, retiering otherwise permitted under our rules will not be deemed an evasion.

454. We also do not find that retiering effectuated between the date the 1992 Cable Act was enacted and the effective date of our rate regulations is a per se evasion. As noted above, some cable operators may have to retier to comply with the Act.[1162] We also agree with Time Warner that Congress specifically mandated that regulations to prevent rate evasion be

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[1158] NATOA Comments at 83-84.

[1159] Notice, 8 FCC Rcd at 537, para. 127; Communications Act. § 633(a)(7)(A), 47 U.S.C. § 543(a)(7)(A).

[1160] See, e.g., CFA Comments at 112; NATOA Comments at 85.

[1161] There is no evidence that operators would or, as a business matter, could shift programming previously offered as part of a tier to "a la carte" status, i.e., a per-channel or per-program offering, to avoid the rate regulation applicable to tiers. A consumer, moreover, has the ability to choose or veto such programming on an individual channel or program basis. Thus, we do not, in the absence of a particular factual context, decide whether a shift of programming from a tier to an "a la carte" offering in and of itself would constitute evasion.

[1162] Time Warner Reply Comments at 65-66, TCI Reply Comments at 68-70.

enacted within 180 days of the Act's enactment,[1163] suggesting that the provision would not be effective prior to the adoption of our regulations. Moreover, the rate reductions we will be ordering are based on rates in effect immediately prior to the date of enactment of the Act, i.e., on September 30, 1992. Thus, interim retiering that resulted in price increases may not affect the initial rate levels required to be set under our rules in any event.[1164]

455. We also believe that the following practices, if established by the evidence, are evasions: (1) implicit rate increases; (2) a significant decline in customer service without a similar decline in price; and (3) deceptive practices such as improper cost shifting or intentionally misstating revenues. An implicit rate increase would include, for example, a decrease in the number of programming services offered, all other costs being equal, without a decrease in rates.[1165] Similarly, a significant decline in customer service, such as no longer providing a programming guide (all other costs being equal), without an accompanying decrease in price, would be deemed an evasion of our rate regulations.[1166] In these first two instances, an operator, instead of proposing a rate increase subject to our rules, has attempted to earn more profits by decreasing services offered to subscribers. Finally, intentional or grossly negligent misstatements of costs or revenues, or attempts to hide or falsify evidence in a rate proceeding, are attempts to avoid the effect of our rate regulations and will be deemed evasions.

f. Small System Burdens

i. Background

[1163] Time Warner Reply Comments at 68.

[1164] Because our rate regulations, as adopted, address potentially evasive practices, it is not necessary to codify our evasive policies as a separate rule.

[1165] An operator reducing programming service without a price reduction would have to file for a basic service rate increase if basic service programming was affected, and would be subject to Commission complaint review if cable programming service offerings were decreased.

[1166] An operator reducing service in this fashion would have to file for a de facto rate increase with local franchising authorities if the services in issue were primarily associated with the basic tier, and would be subject to a complaint of unreasonable cable programming service rates if the services in issue were associated with upper, non-premium tiers.

456. Section 623(i) of the Cable Act requires that the Commission develop and prescribe cable rate regulations that reduce the administrative burdens and cost of compliance for cable systems that have 1000 or fewer subscribers.[1167] The Notice sought comment on proposals to exempt small systems from certain administrative, procedural and substantive requirements associated with rate regulation.[1168] We also asked parties to comment on whether we should distinguish between independent- and MSO-owned small systems. In addition, we invited comment on how to measure the size of a cable system, for example by the number of subscribers by an integrated headend, or by franchise area.[1169]

ii. Comments

457. Most municipalities and cable interests generally support relaxing administrative and procedural requirements for small systems.[1170] One commenter suggests that communities with less than 1000 subscribers served by the same system should meet filing requirements jointly.[1171]

458. Cable interests generally favor either a small system exemption from substantive rate regulation for systems with less than 1000 subscribers[1172], or alternatively, imposition of a benchmark specifically for small systems.[1173] They generally argue that such treatment is justified by the relatively higher costs small systems face.[1174] Some cable interests also argue that if a benchmark is not specifically formulated for small systems, greater latitude to deviate from an

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[1167] Communications Act, §623(i), 47 U.S.C. §543(i).

[1168] Notice, 8 FCC Rcd at 537-38 paras. 128-131.

[1169] Notice, 8 FCC Rcd at 538 para. 133.

[1170] See, e.g., Nashoba Comments at 115; NCTA Comments at 4; NATOA Comments at 87; Bloomingdale Reply at 3; Small Systems Reply at 3; NY State Reply at 6.

[1171] Falcon Comments at 88.

[1172] See, e.g., Nashoba Comments at 113; Adelphia Comments at 110; Fanch Comments at 7; NCTA Comments at 4-5; SCSO Reply at 3.

[1173] See, e.g., Cole Comments at 57; Nashoba Comments at 114; Falcon Comments at 88.

[1174] Cole Comments at 57.

industry benchmark should be permitted.[1175] CATA proposes that the Commission issue a Further Notice of Proposed Rule Making to establish a simple cost justification process for small system rates above a benchmark.[1176] Cole believes that small systems should be able to bypass individual rate proceedings based on a showing that the pertinent subsidiary or MSO owning the system failed to earn undue profit.[1177] Some cable interests favor a presumption that small system rates are reasonable,[1178] and others would extend this presumption to systems larger than 1,000 subscribers.[1179]

459. Municipal interests, including NATOA, oppose either a substantive exemption,[1180] or a presumption that small system rates are reasonable.[1181] Watertown, however, believes that the very smallest systems, those with under 400 subscribers, should be completely exempt from rate regulation. It argues that in such cases, a rate proceeding would be either a major administrative burden or so superficial as to be meaningless.[1182] Some municipalities want to have discretion whether and how to relax requirements.[1183] NTCA, instead of a blanket exemption, proposes that the FCC could require small systems to file or negotiate rates with a franchising authority.[1184]

460. Most cable interests do not believe that we should distinguish between small systems that are independent and

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[1175] Falcon Comments at 88; CATA Comments at 17-18; Nashoba Comments at 114.

[1176] CATA Comments at 21-27.

[1177] Cole at 57.

[1178] See, e.g.; Bloomingdale Reply at 3; SSO Reply at 3.

[1179] See, e.g., CATA Comments at 21-27 (3,500 subscribers or less); Mountain Comments at 1-2 (rural companies with up to 5,000 subscribers per headend); USTA Reply at 9-10; Alaska Reply at 1 (telephone companies providing cable service pursuant to "rural area" exemption).

[1180] NATOA Comments at 19; Municipal Comments at 61.

[1181] Municipal Comments at 61.

[1182] Watertown Reply at 12.

[1183] Municipal Comments at 61.

[1184] NTCA Comments at 6.

those controlled by a large MSO.[1185] They generally argue that the statute does not make such a distinction, and that in reality small systems face the same difficulties regardless of the size of their owners.[1186] However, Northland would distinguish systems controlled by very large MSOs, e.g., those with over a million subscribers.[1187] Municipalities, state and telephone interests generally believe that small system exceptions should apply only to independent-stand alone systems with less than 1,000 subscribers.[1188]

461. On the question of whether to measure the size of small systems on a franchise or integrated headend basis, most cable interests would use a franchise-area basis.[1189] Falcon argues that this harmonizes with the framework of the 1992 Cable Act, which makes the franchise unit the essential unit of rate regulation.[1190] Watertown opposes this approach, arguing that an operator with subscribers in several different jurisdictions in a compact geographic area should be subject to regulation throughout the area. Watertown observes that in such a case it would create confusion if rates were regulated in some jurisdictions but not in others.[1191] Several cable operators and municipal interests would use the number of subscribers served by an integrated headend.[1192]

iii. Discussion

[1185] See e.g., Cole Comments at 55-56; CATA Comments at 35-36; NCTA Comments at 84; Continental Comments at 73; TCI Comments at 68; SSO Reply at 11.

[1186] See, e.g., TCI Comments at 68.

[1187] See, e.g., Northland Comments at 18-19.

[1188] See, e.g., NATOA Comments at 88-89; West Virginia Reply at 9 (supporting NATOA's definition); USTA Comments at 17 (only give special relief to small systems that are not affiliated with any of the top 100 MSOs). See also NY State Reply at 5 (law exempts small "companies" rather than "systems").

[1189] See, e.g., Cole Comments at 56; Falcon Reply at 7; SSO Reply at 3; Adelphia II Reply at 65 (community unit approach)

[1190] Watertown Reply at 11.

[1191] Watertown Reply at 11.

[1192] See e.g., Bloomingdale Comments at 4-5; NATOA Comments at 89 (including all headends of a system).

462. Procedural and Administrative Requirements. In order to ease the burdens on small system operators, we will permit franchise authorities to exempt small systems from having to file an initial rate schedule with the local franchise authority in the following manner.[1193] Once the franchise authority has been certified to regulate basic rates, it will have the discretion to permit a small system to certify, where appropriate, that its rates for basic service and equipment are reasonable under the FCC's rate standards. We believe local authorities are in the best position to evaluate the cost of compliance with initial rate review on small systems and weigh that cost against the beneficial impact that such a review might have on basic cable service rates. However, contrary to SSO's suggestion,[1194] a small system proposing to increase its basic service rates, or answering a cable programming service complaint,[1195] will continue to be required to follow any notice and other procedural requirements we have established. In cases of a proposed basic rate increase or subscriber complaint, the need to ensure that consumers are adequately protected outweighs our concern that small systems' subscribers not be unduly burdened.[1196] We believe that in light of the expedited complaint and dispute resolution procedures we adopt herein, it is not necessary to streamline these further for small systems, as NCTA suggests. As Falcon suggests, we encourage nearby franchise authorities regulating the same small system to file joint certifications with us,[1197] to help reduce regulatory burdens both for the system and the authorities. In addition, in establishing financial and statistical reporting requirements, as well as leased access reporting obligations, we will consider whether these reports can be abbreviated for small systems.

[1193] See SDA Comments at 3, 14; Municipal Comments at 62, 65; NATOA Comments at 87; Small Systems Comments at 4-5.

[1194] SSO Reply at 9.

[1195] We believe that local franchising authorities are more likely than the Commission to be familiar with the cable service of a particular operator, such as the level of satisfaction subscribers have with the cable service in their particular franchise area. We thus do not believe that the Commission has the same ability as local authorities to judge whether certification as to the reasonableness of rates would be appropriate.

[1196] We also decline, to adopt SSO's suggestion that all complaints relating to tiered service be considered by the franchising authority in the first instance. We do not believe that the dual jurisdictional scheme established by the Act permits us to do so. SSO Reply at 18; see supra Section II.A.3.(a)(1)(a).

[1197] Falcon Comments at 88.

463. Substantive Requirements. As we describe above, our plan to regulate cable rates is based upon a formula and a table which takes into account the number of subscribers served by a system, the number of channels offered by the system, and the number of satellite-delivered signals carried on the system.[1198] This table expressly takes into account subscriber levels. Thus, our approach adequately responds to comments calling for special treatment of small systems.[1199] We do not agree that complete exemption from substantive rate regulation as some urge[1200] is advisable, as subscribers deserve to be protected from exorbitant charges, regardless of the size of a system. As we explain above, however, the unique characteristics of small systems, including the often higher costs of operating such a system, justify application of a somewhat different standard to them. This difference is reflected in the rate formula we have devised for evaluating the reasonableness of cable rates. Moreover, our rate approach permits the pass-through of many external costs which are beyond the operator's control, as SSO argues.[1201] This should help alleviate the difficulties that small systems with small revenue bases may have in absorbing cost increases over time. We do not believe that our responsibility under the Cable Act to ensure that consumers are protected from unreasonable rates permits us totally to exempt small systems,[1202] even those very small systems with under 400 subscribers, from rate regulation, or to delegate this

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[1198] See supra Section E.

[1199] See, e.g., Cole Comments at 57; CATA Comments at 17-18; Nashoba Comments at 114; Falcon Comments at 88; SBA Reply Comments at 13-14; SCSO at 4, 6. We will also consider in our Further Notice of Proposed Rulemaking on cost-of-service whether above-the-benchmark cost justifications can be simplified for small systems, as CATA suggests. CATA Comments at 21-27. The Office of Advocacy of the Small Business Administration has filed a motion for acceptance of late filed reply comments. In light of the extraordinary circumstances cited, and the SBA's statutory role in advocating the interests of small business, we grant the motion.

[1200] See e.g., NASHOBA Comments at 113; Adelphia Comments at 110; Small Systems Comments at 4-5; NTCA Comments at 4; Fanch Comments at 7; Falcon Comments at 88.

[1201] SCSCO Reply at 4.

[1202] See generally, West Virginia Reply at 9 (Congress did not intend to exempt small systems from rate regulation, but merely to reduce burdens and cost of compliance). See also, Municipal Comments at 61.

responsibility to franchising authorities, as some argue.[1203] We also believe that a rate methodology that takes into account the special characteristics of cable systems is a more refined regulatory approach than the use of a presumption that small systems' rates are reasonable.[1204]

464. Small Systems Controlled by MSOs. We agree with commenters that no distinction should be made between small systems that are independent and those controlled by MSOs. First, the language of the Cable Act does not distinguish between independently owned small systems and those owned by MSOs. Second, the problems faced by small systems serving smaller, often more rural communities occur whether or not the system is owned by an MSO. Operators must still cope with higher costs associated with serving a smaller subscriber base. We agree with NCTA that in light of the decentralized nature of the cable industry, we should not presume that large corporate ownership of a small system automatically would make compliance with our rate regulation rules and procedures less costly.[1205] Therefore, we will apply our small system rules to systems with under 1000 subscribers, regardless of whether the system is an independent one or owned by an MSO.

465. Measuring Small System Size. For rate regulation purposes, we will determine system size by a system's principal headend, including any other headends or microwave receive sites that are technically integrated to the system's principal headend,[1206] rather than on a franchise area basis, as urged by

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[1203] See, e.g., SSO Comments at 3-8; Bloomingdale Comments at 4. Our rate formula allows systems to arrive at a permitted tier charge exactly calibrated to their number of subscribers.

[1204] See, e.g., Bloomingdale Comments at 3; SSO Comments at 3-8; ARC Comments at 2, 5; NCTA Comments at 84. We also observe, as West Virginia suggests, that establishing a presumption that small system rates are reasonable would place an extremely difficult burden on franchising authorities or others challenging an operator's rates, as the operator would possess the data necessary to overcome the presumption. West Virginia Reply at 8.

[1205] NCTA Comments at 84-85.

[1206] See, Memorandum Opinion and Order in MM Docket Nos. 91-169 and 85-38, 7 FCC Rcd 8676 (1992) (Cable Technical Reconsideration), See also 47 C.F.R. § 76.5(kk) (defining a technically integrated system as one which receives 75 percent or more of its video channels from a common headend).

several commenters.[1207] This definition will ensure that systems that serve large numbers of subscribers in geographic areas do not qualify for relief merely because the franchise areas comprising the system have a subscriber base of less than 1000. In adopting this definition, we are harmonizing our small system rule with most of our existing regulations on cable system size.[1208] We also believe, contrary to Nashoba's assertions, that the benefits of consolidating operations in an integrated headend are sufficiently great that the loss of small system status alone is unlikely to be a significant deterrent to such improvements.[1209]

g. Grandfathering of Rate Agreements

i. Background

466. The Notice also sought comment on the proper interpretation of Section 623(j) of the Cable Act.[1210] That section provides that the statute and its implementing regulations do not supersede franchising agreements made before July 1, 1990 that authorize regulation of basic cable service rates, if there was no effective competition as of that date. We invited comment on our tentative conclusion that this provision permits a franchising authority with a franchise agreement executed before July 1, 1990 that was regulating basic cable rates at that time to continue regulating basic cable rates for the remaining term of that agreement without certification from the Commission. We asked whether such franchising authorities should be required to notify this Commission that they intend to continue to regulate basic cable rates under the provisions of Section 623(j). We also sought comment on whether an agreement that falls within the terms of Section 623(j) would supersede Commission regulations governing the rates for cable programming services that are not part of the basic tier. Finally, we requested comment on how franchising authorities now regulating rates and not covered by the grandfathering provision of Section

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[1207] See, e.g., SSO Comments at 3; Nashoba Comments at 110-111.

[1208] See, e.g., 47 C.F.R. §76.5(a). Further, we do not believe that Falcon's proposal, to base entitlement to small system relief on area population density, adequately comports with the statutory language. Falcon Comments at 87. See also Nashoba Comments at 112. Section 623(i) applies to systems that have "1,000" or fewer subscribers". (emphasis supplied.)

[1209] Nashoba Comments at 110-111.

[1210] Communications Act, § 623(j), 47 U.S.C. § 543(j).

623(j) should make the transition to rate regulation under our new rules.[1211]

ii. Comments

467. Two of the parties addressing these issues agree with our tentative conclusion that Section 623(j) "grandfathers" only rate agreements in place on July 1, 1990, if the cable system was subject to rate regulation at that time.[1212] On the other hand, six commenters contend that the Commission should broadly construe Section 623(j) as grandfathering any rate regulation agreement in effect upon implementation of the Commission's rules, whether or not the agreement was executed before or after July 1, 1990, as long as there was no effective competition under governing Commission rules. They argue that there is no rational basis for treating agreements concluded after July 1, 1990 differently.[1213] Most commenters also believe that any rules implementing Section 623(j) should apply only to basic cable service, and that any rates for non-basic tiers of cable programming service are subject to exclusive Commission review.[1214]

iii. Discussion

468. We conclude that Section 623(j) authorizes a franchising authority with a franchise agreement executed before July 1, 1990, that was regulating basic cable rates at that time to continue regulating basic cable rates for the remaining term of that agreement. While such a grandfathered rate agreement is in effect, the franchising authority may regulate basic cable rates without following the Commission's substantive rate standards.[1215] In addition, a grandfathered franchising authority will not have to file for certification during the

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[1211] Notice, 8 FCC Rcd at 538-39, para. 135.

[1212] See Newhouse Comments at 47; Cole Reply Comments at 29.

[1213] See Falcon Cable Group Comments at 89-90; Nashoba Comments at 146-47; Time Warner Comments at 93-4; Austin Comments at 76; Adelphia Reply Comments at 83; Cole Reply Comments at 29; Time Warner Reply Comments at 69-70.

[1214] See Time Warner Comments at 93; NASHOBA Comments at 147; Falcon Cable Group Comments at 90.

[1215] Consistent with our decision regarding the impact of grandfathered agreements on cable programming services, infra this section, grandfathered agreements will not be enforceable to the extent they seek to limit a cable operator's ability to retier service offerings.

remaining term of the agreement, but will simply have to notify the Commission of its intent to continue regulating basic cable rates. As we stated in the Notice, this notification will give the Commission the information we need regarding those systems regulated under the 1984 Act to assess the impact of our new regulatory scheme under the 1992 Cable Act.[1216]

469. While many commenters urge us to grandfather rate agreements executed after July 1, 1990, we do not believe that an expansive reading of Section 623(j) is warranted. Such an interpretation conflicts with both the explicit wording of Section 623(j,) and the intent of the Cable Act that local franchising agreements are abrogated unless they conform with the Act and the Commission's Rules.[1217] Moreover, it appears that Section 623(j) was added as a limited exception to permit communities such as Dubuque, Iowa "to maintain [their] very unique rate regulation agreement[s]"[1218] where there had not been effective competition.

470. Likewise, we find that Section 623(j) does not supersede the Commission's regulation of cable programming services. Since the 1984 Cable Act only permitted local franchising authorities to regulate basic rates in instances where there was no effective competition, we do not believe that we can interpret such a grandfathered rate agreement as conferring greater authority today than it did in 1990. Furthermore, the explicit wording of Section 623(j) and its legislative history limit the scope of the grandfathering to basic rate regulation.[1219] Thus, the Commission shall regulate cable programming service rates in all cases, irrespective of whether there is a grandfathered rate agreement regulating basic cable rates.

471. Finally, we recognize that some franchising authorities have been regulating basic cable rates but are not covered by Section 623(j) because their franchise agreements were executed after July 1, 1990. As noted above, we do not believe

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[1216] Communications Act, § 623(k), 47 U.S.C. § 543(k).

[1217] See Section II.A.3.a(1)(b)AA, supra.

[1218] See 138 Cong. Rec. H.6506 (daily ed. July 23, 1992). For cable programming services complaints filed against operators subject to grandfathered rate agreements, we will make an effective competition finding prior to acting on the merits of the complaint. The burden will be on the operator to establish, in its response to the complaint, that effective competition exists in the franchise area.

[1219] See House Report at 66.

that these rate agreements can be grandfathered under Section 623(j). Accordingly, if a franchising authority with such an agreement wishes to continue regulating basic cable rates, it must file for certification pursuant to the 1992 Cable Act and our rules and apply our substantive rate standards. We recognize that this may cause some difficulty for franchising authorities that have recently completed ratemaking proceedings. However, in view of the mandate of Section 623 that local regulation of basic rates must comply with the Commission's new standards, we believe that this result is unavoidable.

h. Reports on Average Prices

i. Background

472. Section 623(k) of the Cable Act requires the Commission to annually publish statistical reports regarding average cable rates and associated fees, including a comparison of such charges between those systems that are subject to effective competition and those systems that are not subject to effective competition, as determined under Section 623(a)(2) of the Act.[1220] The Notice listed different types of data that we proposed to collect and several ways to obtain such data. We stated that such information might be obtained from trade publications but suggested that information obtained directly from cable operators on an annual basis might be preferable. We also stated that requiring the annual collection of data would be costly for both the industry and the Commission, and proposed that we might collect data from a sample of cable systems rather than from the industry as a whole. We observed that such a collection of data may duplicate in part the data needed to carry out the ongoing rate regulation provisions of the Cable Act and tentatively concluded that we should combine the data requirements on a single form. We invited comment on these proposals and invited commenters to suggest other ways we may obtain the data needed to fulfill the annual reporting requirements specified in Section 623(k).[1221]

ii. Comments

473. Only a few commenters address these issues. Of those who did, all oppose using trade publications as a source of data. Cole and Continental emphasize that the data in trade publications are based on voluntary compliance and often

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[1220] Communications Act, § 623 (k), (a)(2), 47 U.S.C. § 543 (k), (a)(2).

[1221] Notice, 8 FCC Rcd at 539.

incomplete reporting.[1222] Continental and TCI state that the Commission should collect data directly from cable operators, but should restrict the breadth of its inquiry and the number of systems queried. TCI contends that a statistically significant random sample should provide adequate information on every variety of cable system.[1223] Cole suggests that a modest, random sample (rotating on an annual basis) should provide adequate information on the range of cable systems.[1224]

474. Several cable operators state that data collection should be by system, and not by franchise area.[1225] Newhouse points out that most operators do not keep detailed information on a franchise-by-franchise basis.[1226] Nashoba also argues that to reduce administrative burden, data collection should be system-wide.[1227] Further, Operators argue that all data requirements should be on a single form, so the operator will know the full extent of the information required.[1228] Newhouse further states that the FCC should not finalize forms in this proceeding but issue a Further Notice so forms can be specifically tailored to regulations adopted in response to the Notice.[1229]

iii. Discussion

475. In order to comply with the requirements of Section 623(k), we have concluded that we need to collect certain cable system data. These data include: rates charged for basic cable service, cable programming services and other cable programming; fees for converter boxes, remote control units, installation and disconnection; and any other charges for equipment or service levied on subscribers. We will also collect information on system size (measured by number of subscribers), system channel capacity and other characteristics such as percent of distribution plant above or below ground, length of

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[1222] Cole at 58; Continental at 73.

[1223] TCI at 68.

[1224] Cole at 58.

[1225] Adelphia at 152; Nashoba at 150.

[1226] Newhouse at 49.

[1227] Nashoba at 150.

[1228] Nashoba at 150; Newhouse at 50; Continental at 73.

[1229] Newhouse at 50.

distribution plant, subscriber density per mile. [1230] The annual statistical report will consist of a compilation of the above data elements.

476. We agree with commenters that we need to require cable operators to submit the information directly to us on a regular basis. Information obtained directly from cable operators would be more reliable, complete and comparable than that obtained, for example, from trade publications. We recognize that commenters unanimously support collecting information on a per system rather than a per franchise basis. However, our recent experience with our 1992 Cable Survey indicates that the necessary information is indeed available by franchise area. We further believe that the franchise is the appropriate unit to examine, because franchise authority-imposed costs and rate regulations may vary among franchises.

477. We will collect this information from cable operators on either a sample basis or from the industry as a whole. We will also solicit specific information from cable operators on their leased access channel usage and rates. This information collection may, or may not, be part of the process whereby data relating to system rate and financial information is collected for purposes of compliance with Section 623(g) (collection of information).

i. Effective Date

i. Background

478. The Cable Act of 1992 states that the amendments to Section 623, that mandate rate regulation by the Commission of cable systems that are not subject to effective competition, shall become effective 180 days from the date of enactment of the Act.[1231] Section 3 of the Act requires the Commission to prescribe regulations governing the rates for basic and cable programming service, as well as the prevention of evasions within 180 days of enactment.[1232] In order to meet statutory deadlines, we proposed in the Notice, that we adopt implementing rules prior to April 3, 1993, and make them "effective as rapidly thereafter as is reasonably feasible."[1233] We sought comment on this proposal and on what, if any, interim requirements may be

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[1230] We will address this issue in more detail in a further notice of proposed rulemaking.

[1231] Cable Act of 1992, § §3(b).

[1232] Cable Act of 1992,§ 3(b).

[1233] Notice, 8 FCC Rcd at 539, para. 143.

necessary for us to impose until the new rules come into force.[1234] We also tentatively concluded that although we must establish regulations within 180 days of the date of enactment of the Cable Act of 1992, we are not required by the Act to implement all "steps that cable systems must take to meet the obligations of the statute or our rules must be completed on that date."[1235]

ii. Comments

479. Cable operators, in general, maintain that the Commission should provide a transition period prior to final implementation. They argue that the rules issued in this proceeding should be introduced gradually because this rulemaking will require significant changes in how cable systems conduct their operations.[1236] Some of these parties point out that in prior proceedings the Commission has allowed a transitional approach to phase-in rules.[1237] Some cable operators argue for a long implementation period prior to the final rules adopted in this proceeding take effect. Many cable operators argue for a six month waiting period before any of our rate regulation rules become effective.[1238] This time period, they argue, will permit cable operators and the Commission to adapt to the new regulatory regime. NCTA states that such a delay is consistent with the Cable Act of 1992, which it asserts, simply requires promulgation of rules within 180 days of the day the Act was enacted.[1239]

[1234] Notice, 8 FCC Rcd at 539, para. 143.

[1235] Notice, 8 FCC Rcd at 539-540, para. 143.

[1236] See, e.g., CIC Comments at 9-10; NCTA Comments at 85; Nashoba Comments at 151-152; AdelphiaII Comments at 155-156; Cole Comments at 61; Armstrong Comments at 37; Intermedia Comments at 38-39; Continental Reply Comments at 87; Comcast Comments at 65-66; and Falcon Comments at 93.

[1237] See, e.g., Comcast Comments at 69-70, citing Second Computer Inquiry, 84 F.C.C. 2d 50, 66 (1980); Amendment to Part 69 of the Rules, 2 F.C.C. Rcd 6447, 6457 (1987); MTS and WATS Market Structure (Phase I), 93 F.C.C. 2d 241, 283-297 (1983), recon. 97 F.C.C. 2d 682 (1983).

[1238] See, e.g., Continental Comments at 74; NCTA Comments at 85; Nashoba Comments at 153; AdelphiaII Comments at 157; Cole Comments at 62; Continental Reply Comments at 90; Comcast Comments at 72; and Falcon Comments at 94.

[1239] NCTA Comments at 85;see also CIC Comments at 10; Continental Comments at 74-75; Cole Comments at 62; Continental Reply Comments at 89; and Comcast Comments at 69.

Some cable operators also argue that implementation of these rules should be postponed because these rules depend upon actions the Commission must take to implement other sections of the Cable Act of 1992.[1240] Several cable operators ask that the Commission prohibit franchising authorities from regulating basic service, and the Commission refrain from acting on any complaints, for a period of ninety days from the date of issuance of this Report and Order.[1241]

480. Other parties, particularly municipalities, maintain that the need for immediate protection from excessive rates is paramount.[1242] These parties argue that the Commission should not delay the effectiveness of its rules promulgated in this proceeding beyond April 3, 1993.[1243] Austin argues for a tailored approach to implement the rules in this proceeding if its two step rate regulation methodology is adopted by the Commission.[1244] Austin urges that the Commission to make its per channel benchmark approach for basic and cable programming services effective on April 3, 1993, and initiate immediately a Second Further Notice to establish industry normative costs, to be used in future basic cable rate regulation.[1245] Municipal, while against a delay in implementing the rules in this proceeding after April 3, 1993, offers a suggested interim regulatory approach for the Commission to follow if such a delay is found necessary. It argues that the Commission should take the following two steps: 1) existing cable rates should be rolled back to at least October 4, 1992 levels; and 2) these rates should be subject to refund pending an initial review of their reasonableness.[1246]

[1240] See, e.g., Nashoba Comments at 151; AdelphiaII Comments at 155; and Continental Reply Comments at 88. Some parties, such as Nashoba and AdelphiaII also contend that these rules implementation must be delayed until must-carry retransmission consent election has been made and respective negotiations completed. See Nashoba Comments at 151; AdelphiaII Comments at 155; and Continental Reply Comments at 88.

[1241] See, e.g., CIC Comments at 10; see also Armstrong Comments at 37; and Intermedia Comments at 38.

[1242] See, e.g., Municipal Reply Comments at 11; and NATOA Reply Comments at 35.

[1243] See, e.g., Municipal Reply Comments at 11; NATOA Reply Comments at 35; and Rapids Reply Comments at 8.

[1244] Austin Comments at 11.

[1245] Austin Comments at 11.

[1246] Municipal Reply Comments at 11-12.

481. Some municipalities agree with the cable operators that the Commission should allow a short phase in of the rules adopted in this proceeding. However, their rationale is based upon providing local governments additional time to enact ordinances.[1247] Such a delay, they state, will not adversely impact consumers.[1248]

iii. Discussion

482. Section 3(b) of the Cable Act of 1992 states that the amendments to Section 623 of the Communications Act will take effect on April 3, 1993. Section 623 also requires the Commission to prescribe regulations to govern rates for basic and cable programming services, as well as the prevention of evasions, on or before this date. The adoption of this Report and Order meets these requirements.

483. An issue closely related to the time limits for Commission action imposed in the Act is how quickly the rules we adopt today can become effective so that consumers receive the full protection from unreasonable rates and practices that Congress intended when it passed the Cable Act of 1992. Because we have frozen all rates for basic and cable programming services offered by cable systems not subject to effective competition for 120 days effective April 5, 1993, we assure that cable operators will not raise their rates in the period prior to our rules becoming effective and fully implemented. With this freeze we can comply with all the procedural safeguards imposed by the Administrative Procedure Act and the Paperwork Reduction Act without fear that compliance places consumers at risk of unreasonable behavior by their cable operator. The freeze will also permit franchising authorities and consumers to become familiar with our rules before they become effective.

484. We have also carefully constructed timetables and procedural dates for implementing our rules designed to permit franchising authorities and cable operators a reasonable time to comply with the new rules. The implementation schedules are designed to give parties sufficient time to meet their obligations under the new regulatory scheme. We believe the result will be an implementation that brings consumers the benefits of regulation with minimal rate and service churn, enables franchising authorities and this Commission to meet their new responsibilities under the Act, and permits operators to make a good faith effort to comply with their newly imposed obligations. Therefore, it is not necessary to provide that our

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[1247] See, e.g., Rapids Reply Comments at 8;Watertown Reply Comments at 8-9.

[1248] Id.

rules will become effective earlier than thirty days after Federal Register publication. We anticipate that an effective date of June 21, 1993 will provide adequate time for Federal Register publication and compliance with Paperwork Reduction Act requirements. Accordingly, we will make our regulations effective on that date.

B. LEASED COMMERCIAL ACCESS

1. Leased Access: Background

485. Section 612 of the Cable Act of 1984 established a federal scheme through channel leasing to assure access to cable systems by third parties unaffiliated with the cable operator. Channel set-aside requirements were established, proportional to a system's total activated channel capacity, in order to "to assure that the widest possible diversity of information sources are made available to the public from cable systems in a manner consistent with the growth and development of cable systems."[1249] Specifically, a cable system with 36-to-54 activated channels was to designate ten percent of its channels not otherwise required for use by federal law or regulation; a 55-to-100 channel system was to designate 15 percent of channels not otherwise required for use by federal law or regulation; and a system with over 100 channels was to designate 15 percent of all channels.[1250] A cable system operator was permitted to use any unused leased channel capacity for it own purposes until such time as a written agreement for a leased channel use was entered into. Each system operator subject to this requirement was to establish "the price, terms, and conditions of such use which are at least sufficient to assure that such use will not adversely affect the operation, financial condition, or market development of the cable system."[1251]

486. The House Committee Report on the 1984 statute provided that the operator could look to the following factors in establishing access conditions:

> (1) The nature of the service, although not the specific editorial content of the programming (e.g.,

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[1249] Communications Act, § 612 (a), 47 U.S.C. § 532 (a).

[1250] Communications Act, § 612 (b) (1), 47 U.S.C. §532 (b) (1). An operator of any cable system with fewer than 36 activated channels was not required to designate channels for leased access use unless required to do so by the terms of a franchise agreement in effect as of the enactment of the 1984 Act.

[1251] Communications Act, § 612 (c) (1), 47 U.S.C. § 532 (c) (1).

> the operator can charge more to a movie service than an instructional channel);
> (2) The effect of the proposed leased access service on the marketing of the operator's current mix of service;
> (3) The potential for market fragmentation due to this leased access programming;
> (4) Any effect this service many have on subscriber or advertising revenues.[1252]

Consistent with the above, the Act provided that, in any action brought under this section...

> [T]here shall be a presumption that the price, terms, and conditions for use of channel capacity designated... are reasonable and in good faith unless shown by clear and convincing evidence to the contrary.[1253]

487. Although as discussed below, the commercial access provisions of the Act have been amended in certain respects, the above provisions have not been significantly altered. With respect to enforcement, the 1984 Act also provided that any person aggrieved "may bring an action in the district court of the United States for the judicial district in which the cable system is located...."[1254] Only upon a "showing of prior adjudicated violations" could Commission authority be invoked to assure the availability of access and that the "price, terms, and conditions" involved were consistent with the Act.[1255]

488. In 1990, the Commission issued its report to Congress on the functioning of the 1984 Act as was required by the Act.[1256] Therein the Commission made the following finding:

> Although encouraging leased access programming was a key purpose of the Cable Act, existing enforcement provisions are too cumbersome to permit the development of leased access as a promising force in the video market. The lack of adequate remedies for any

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[1252] 1984 House Report at 51.

[1253] Communications Act, § 612 (f), 47 U.S.C. § 532 (f).

[1254] Communications Act, § 612 (d), 47 U.S.C. § 532 (d).

[1255] Communications Act, § 612 (e) (1), 47 U.S.C. § 532 (e) (1). The enforcement powers of the Commission have been expanded by the 1992 Act, as discussed below.

[1256] Report, MM Docket No. 89-600, ("1990 Cable Report"), 5 FCC Rcd 4962 (1990).

> programmer denied fair access to local cable distribution has retarded the overall development of leased access programming.[1257]

Based on this finding, the Commission recommended that

> Congress should encourage leased access by: (a) adding "the promotion of robust programming competition" to the stated purposes of leased access obligation; (b) changing the burden and standard of proof required to establish a violation of the leased access rules; (c) providing the Commission with original jurisdiction over the provision of leased access channels; and (d) requiring cable operators to provide billing and collection services for channel lessees pursuant to Commission rules.[1258]

489. The 1992 Cable Act amendments to Section 612 where largely consistent with these recommendations. The statutory purpose was broadened to include "the promotion of competition in the delivery of diverse sources of video programming" and the Commission was provided with expanded authority to:

> (i) determine the maximum reasonable rates that a cable operator may establish . . . for commercial use of designated channel capacity, including the rate charged for the billing of rates to subscribers and for the collection of revenue from subscribers by the cable operator for such use;
> (ii) establish reasonable terms and conditions for such use, including those for billing and collection; and
> (iii) establish procedures for the expedited resolution of disputes concerning rates or carriage under this section.[1259]

The legislative history expresses concern that some cable operators may have established unreasonable terms or may have had financial incentives to refuse to lease channel capacity to potential leased access users out of competitive motives, especially if the operator had a financial interest in the programming services it carried.[1260] However, the Commission's

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[1257] 1990 Cable Report, supra, 5 FCC Rcd at 4973.

[1258] 1990 Cable Report, supra, 5 FCC Rcd at 4976.

[1259] Communications Act, § 612 (c) (4) (A) (i) (ii) (iii), 47 U.S.C. §532 (c) (4) (A) (i) (ii) (iii).

[1260] House Report at 39.

1990 Cable Report recommendation regarding the burden of proof in disputes was not adopted and the provisions of Section 612(f) which establish these burdens were not amended.

490. Under the amendments to Section 612, cable operators were also permitted to place programming from a qualified minority or educational programming source on up to 33 percent of the cable system's designated leased access channels.[1261]

491. It was the Commission's belief, as expressed in its 1990 Cable Report, that commercial leasing of cable channels could serve important diversity and competition objectives and that more centralized regulatory oversight would assist in the achievement of these objectives. Congress, through the amendments adopted, appears to have agreed with this view and thus the Commission will now be in a position to take a more active role in administering these requirements. The specific implementing rules adopted are discussed below. However, understandably given the other matters at issue in this proceeding, we did not receive a large response relating to leased access issues. Thus, the rules we adopt should be understood as a starting point that will need refinement both through the rule making process and as we address issues on a case-by-case basis. In this regard we are aware that leasing issues may need to be addressed in quite different fashions depending upon the nature of the service involved --whether the lease is for a pay channel, an advertiser supported channel intended for wide distribution, a channel for a narrow commercial purpose not relevant to the wide body of cable subscribers, or for a single program or series of programs. Thus, we are not at this time attempting to comprehensively resolve all the issues potentially involved, many of which can better be resolved in a more specific concrete factual setting.

492. In the rules adopted, we set a standard for maximum leased access rates based on the highest implicit fee charged any nonaffiliated programmer within the same program category. We have also addressed issues regarding access terms and conditions, tier placement, technical standards for use, technical support, security deposits, conditions based on content and requirements for billing and collection service. A procedure for the expedited resolution of disputes is also established. In the Notice we tentatively concluded that the leased access requirements and related rate controls were intended to apply to all systems regardless of the "effective competition" test that

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[1261] Communications Act, § 612 (i) (1) (c), 47 U.S.C. § 532 (i) (1) (c).

governs basic tier and programming service rate regulation.[1262] There appears to be no disagreement with this tentative conclusion and the rules adopted will accordingly be applicable to systems without regard to the effective competition test.

2. Leased Access: Reasonable Terms and Conditions of Use

i. Background

493. The Notice observed that in directing the Commission to "establish reasonable terms and conditions"[1263] for commercial use of leased access cable channels, Congress was particularly concerned that leased access programmers be offered a "genuine outlet" for their product.[1264] We sought comment on whether our rules should address tier location, channel position and time scheduling for leased access use. We tentatively concluded that operators should apply the same technical standards to leased access that they apply to programs carried on public, educational and governmental access channels. For programmers who do not prepay in full for the access requested, we sought comment on when an operator should be able to require the posting of a bond or deposit as security for payment.[1265]

494. We also sought comment on our proposal to prohibit operators from setting terms and conditions based on content, except to the limited extent that content may be considered in order to set reasonable prices for commercial use of channels by unaffiliated programmers.[1266] Moreover, we sought comment on our proposal to exempt from this prohibition on operator editorial control, those terms and conditions relating to indecent programming consistent with the Cable Act, Sections 612 (h) and (j),[1267] and our implementing regulations.[1268] We also asked for discussion of whether the Cable Act requires us to continue to

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[1262] Notice, 8 FCC Rcd at 540, para. 146.

[1263] Communications Act, § 612 (c) (4) (A) (ii), 47 U.S.C. § 532 (c) (4) (A) (ii).

[1264] Senate Report at 79.

[1265] Notice, 8 FCC Rcd at 542, paras. 156-158.

[1266] Notice, 8 FCC Rcd at 542, para. 159.

[1267] Communications Act, § 612 (h), (j), 47 U.S.C. § 532 (h), (j).

[1268] Id. See First Report and Order, MM Docket No. 92-258, 8 FCC Rcd 998 (1993) and Second Report and Order, MM Docket No. 92-258, FCC 93-164 (adopted March 25, 1993).

permit disparate treatment between unaffiliated and affiliated leased access users.[1269]

ii. Comments

495. Cable interests generally oppose the Commission addressing in our rules tier location, channel position, and time scheduling for leased access use.[1270] On the other hand, MEA believes that leased access channels should be carried on the lowest tier possible in order to be widely available.[1271]

496. Cable interests that address what guidelines we should establish for technical standards, generally argue that cable operators should be permitted to require higher technical standards than what is generally accepted for public, educational and governmental access channels.[1272] NATOA, however, opposes the imposition by cable operators of any technical standards on leased access users that would significantly increase the cost of providing programming over such channels.[1273] Regarding the level of technical support that an operator should be required to supply the leased access user, cable interests generally maintain that leased access programmers should be required to pay for whatever support desired and that demands should not extend beyond whatever equipment or facilities are available to the operators.[1274]

497. Cable interests generally argue that cable operators should not be required to provide billing and collection

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[1269] Notice, 8 FCC Rcd at 542-543, para. 160. The legislative history of the 1984 Act indicates that Congress contemplated different treatment of leased access providers, who under Section 612 (b) (1) are unaffiliated with the operator, and of affiliated entities who may lease a channel or have an equivalent arrangement. 1984 House Report at 53.

[1270] See, e.g., Caribbean Comments at 24; Cole Comments at 66-67; Continental Comments at 84.

[1271] MEA Comments at 31-32.

[1272] Continental Comments at 85; Cole Comments at 67-68.

[1273] NATOA Comments at 94.

[1274] Cox Comments at 43; Cole Comments at 67; Blade Comments at 24. Even for satellite-delivered programming, Cole argues that there are vendors available for downlink services and it is up to the lessee to negotiate its own terms for utilization of such services. Cole Comments at 67.

services,[1275] while others, including video programmers, maintain that it is essential that operators provide these services.[1276]

iii. Discussion

498. Leased channel placement The legislative history of the Act indicates that Congress intended for leased access to provide programmers a "genuine outlet" for their product.[1277] Cable interests correctly observe, however, that unlike core PEG channels, Congress did not mandate specific tier location for leased access and did not require that leased access be carried on basic service.[1278] Indeed, in outlining the components of the basic tier subject to rate regulation in Section 623 (b) (7) (A), Congress did not include leased commercial access channels as part of its basic tier definition.[1279] Moreover, Congress intended to balance the needs of leased access users with the legitimate needs of cable operators to market their programming.[1280]
Thus, we believe that channel placement or tier access is a matter that is best left in the first instance to negotiation between the parties bearing in mind the nature of the service

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[1275] Continental Comments at 93; Cox Comments at 39; Time Warner Comments at 101.

[1276] Fox Comments at 4-5; MPAA Comments at 6-8; CFA Comments at 148-149.

[1277] Senate Report at 79. Because neither the Act itself, its legislative history nor the record before us distinguishes among particular terms and conditions appropriate for various types of leasing - e.g., leasing an hour on a regular leased channel, leasing a whole channel, or leasing for use a subscription service, we believe that cable operators should be required to accommodate all such leases in a reasonable manner.

[1278] Caribbean Comments at 24; Cole Comments at 66-67; GTE Comments at 17. Cox asserts that any regulation that impinges upon a cable operator's decisions regarding channel placement could be in derogation of the operator's First Amendment rights. Cox Comments at 42.

[1279] Systems with only a basic tier, of course, would necessarily be required to offer leased commercial access on that tier, pursuant to the requirements of 47 U.S.C. § 612 (b) (1).

[1280] Senate Report at 79.

being offered,[1281] the relationship between the charge imposed and the desirability of the channel,[1282] and the congressionally mandated objectives that leased channels provide competition in the delivery or programming and afford programmers genuine outlets. Given the diversity of possible access uses, we do not believe it desirable at this time to attempt an a priori allocation scheme.[1283] Also, in order to guarantee that a variety of individuals and groups have access to the channels,[1284] each lessee will only be allowed to lease up to one channel's capacity, if there are other users demanding use of the additional designated channels.

499. Technical quality of programming With regard to technical standards and conditions, i.e., programming production standards, for leased access, we decline to allow an operator to impose higher standards than those an operator now accepts for public, educational and governmental access channels. We believe that the quality of video production equipment today is generally high and is constantly improving so that the equipment used

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[1281] That is whether the leasing party is seeking a pay channel or channel for more general distribution, a complete channel or an outlet for an individual program.

[1282] The value of a channel would logically vary significantly based on the subscriber base it accessed. Even within tiers, channels may be perceived to have different values as Congress recognized in adopting the broadcast signal on channel carriage requirements.

[1283] In the absence of any specific evidence that such action is necessary, we also decline to establish guidelines regarding the time that channel capacity must be made available. Generally, leased access programmers should have access to channel capacity at any time of the day, up to and including the full programming day, subject to the needs of other leased access providers, of qualifying educational or minority programming sources, or cable operator discretion under Section 10 (a) of the Act relating to indecent leased access programming. However, we recognize that different types of programming are best scheduled at different times of day. We expect operators and leased access providers to negotiate in good faith on this issue. Of course, any indecent programming, not prohibited by a cable operator under Section 10 (a), must be blocked in accordance with Section 10 (b) and the Commission's implementing rules adopted in First Report and Order in MM Docket No. 92-258, 8 FCC Rcd 998 (1993).

[1284] This guideline is not intended however, to permit "adverse" effects on the "operation, financial condition, or market development of the cable system." Communications Act, § 612 (c) (1), 47 U.S.C. § 532 (c) (1).

should produce sufficient quality programming. On the other hand, we also believe that a leased access provider with programming intended to be competitive with existing cable services, such as premium channels, would have every incentive to provide quality equal to or greater than the operator's other offerings. In such cases, technical standards would be unnecessary. Operators, therefore, may not require standards for leased access that are any higher than those applied to public, educational and governmental access channels.[1285]

500. Technical support We agree with cable operators that they should not have to provide technical support for leased access programmers where an adequate competitive market exists which can provide such support.[1286] We also believe that leased access programmers must reimburse operators for the reasonable cost of any technical support operators actually provide. We also agree with Cox that an operator is not obligated to invest in equipment or technology not already in its possession.[1287] However, a minimal level of technical cooperation is likely to be necessary in order for a leased access program to be delivered over an operator's system. For example, a leased access provider may have interconnection requirements.[1288] Our concern that an

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[1285] We also agree with NATOA that the imposition by cable operators of higher technical standards could significantly increase the cost of providing programming over leased access channels and ultimately defeat the goal of fully utilizing them for diverse programming. NATOA Comments at 94.

[1286] Continental Comments at 85; Cole Comments at 67. For example, we believe that there is a competitive market for many technical services, including satellite reception facilities, and commercial lessees can negotiate independently to acquire these services if they so desire. We also do not require operators to lease physical space to leased access providers to permit, for example, the placement of a satellite dish on their premises. They would however, have to permit a leased access satellite feed to interconnect so that it can be delivered over the operator's system.

[1287] Cox Comments at 43.

[1288] The interconnection requirements of leased access programmers may not be as complex as those of interested parties seeking interconnection with local telephone company facilities. Local exchange carriers (LECs) are now required to offer physical collocation to all interconnectors that request it, although the parties are free to negotiate satisfactory virtual collocation arrangements. Expanded Interconnection with Local Telephone Company Facilities, 7 FCC Rcd 7369 (1992) petitions for recon. pending, petition for review docketed sub nom. The Bell Atlantic Telephone

operator may unreasonably refuse to cooperate with a leased access provider in order to prevent that provider from obtaining channel capacity, leads us to prohibit such conduct. Thus, an operator will be required to provide the leased access programmer with the minimal amount of technical support, whether it be equipment, technology or other miscellaneous support, which would be necessary for the programmer to present its material on the air.

501. Security deposits We agree with cable operators that they should have discretion to require reasonable security deposits or other assurances from programmers who are unable to prepay in full for access to leased commercial channels.[1289] In this regard, we agree with Cox that our rules should strive to preserve the financial integrity of the operator by allowing for flexible negotiations between the parties.[1290] Furthermore, we agree with Continental that it would be unfair to require the cable company to bear the financial risk of airing leased access programming without the provision of suitable guarantees.[1291]

502. Content restrictions We also prohibit cable operators from setting terms and conditions for leased access use based on content except to the limited extent that it is necessary for an operator to establish a reasonable price for the commercial use of designated channel capacity by an unaffiliated person.[1292] For example, operators may make certain determinations regarding programming based on categorizing leased access contracts according to the scheme we have designed for maximum reasonable rates in Section II.B.3, supra. We also exempt from this prohibition those terms and conditions relating to indecent

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Cos., et. al. v. FCC, No. 92-1619 (D.C. Cir. filed Nov. 25, 1992). While we do not impose the same obligations upon cable operators, we will require the cable operator to offer to leased access programmers the same services as would be offered to comparable programming services that use the operator's non-leased access channel capacity.

[1289] Continental Comments at 85; Cox Comments at 44; Cole Comments at 68.

[1290] Cox Comments at 44.

[1291] Continental Comments at 85-86.

[1292] Communications Act, § 612 (c) (2), 47 U.S.C. § 532 (c) (2).

programming and materials that are consistent with the Cable Act and our related regulations.[1293]

503. Rate discrimination We agree with the majority of commenters who state that nothing in the Cable Act of 1992 changes the 1984 Act's policy of permitting favorable rates, terms and conditions for a party affiliated with a cable operator.[1294] As we indicated in our Notice, the 1984 Act vested operators with the discretion to discriminate in the rates, terms and conditions set for the two classes of programmers. We agree with Cox that Congress's authorizing the Commission to establish maximum rates, terms and conditions for commercial use of leased access cable channels in no way indicates that Congress intended

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[1293] In MM Docket No. 92-258, we adopted rules to implement Sections 10 (b) and (c) of the Cable Act, which among other things, allow cable operators to prohibit indecent programming on leased access and PEG channels. First Report and Order, MM Docket No. 92-258, 8 FCC Rcd 998 (1993) and Second Report and Order, MM Docket No. 92-258, FCC 93-164 (adopted March 25, 1993). We indicated therein that we would address issues relating to who should bear the costs associated with implementation of the blocking mechanisms and restrictions under these sections in this proceeding.

Any costs involved are dependent to some extent on the procedures followed by the system operator and the nature of the channels that are leased. The rules mandated by Section 10 relating to indecent leased access programming, however, have been stayed by the U.S. Court of Appeals for the D.C. Circuit, Alliance for Community Media et al. v. FCC, D.C. Cir. Case No. 93-1169 (April 7, 1993), and a stay request is presently pending before the same court with respect to the rules applicable to the PEG channels, Alliance for Community Media et al. V. FCC, D.C. Cir. Case No. 93-1270 (filed April 16, 1993). As a consequence, we believe we may be in a better position to resolve more specifically issues relating to payment for the costs of these channels after the litigation is complete and the court has addressed the constitutional issues involved.

[1294] See, e.g., Cole Comments at 68-69; Continental Comments at 86; Cox Comments at 44-45. Comments submitted by Cole and Continental point out that the 1992 Act amends Section 612 (b) (2) of the Communications Act, which specifically applies to the designation of channel capacity for commercial use by "unaffiliated" persons. 47 U.S.C. § 532 (b) (2). In addition, § 612 (d) of the Communications Act directs any court reviewing an access complaint to disregard "any price, term, or condition established between an operator and an affiliate for comparable services." 47 U.S.C. §532 (d). Thus, the Commission is precluded from establishing rates, terms and conditions for leased access based on transactions with an affiliate.

for the Commission to take this discretion away from cable operators.[1295] Thus, we find that the 1984 and 1992 Acts do not authorize the Commission to require that operators apply the same rates, terms and conditions for the leasing of channel capacity by both affiliated and nonaffiliated programmers.

504. Billing and collection services With respect to the requirement that operators offer billing and collection services for leased access users, we understand Fox's concern that without such a requirement, the lessee might have to develop its own arrangements for these functions in each market, thereby diminishing its incentives to lease capacity.[1296] Indeed, in our 1990 Cable Report, we recommended that Congress require cable operators to provide billing and collection services for channel lessees.[1297] Moreover, the record now before us contains little specific data on the existence of competitive providers of billing and collection services to leased access programmers, or on the likelihood that a competitive market for these services will develop in the future, and most importantly, on whether such services will enable a leased access programmer to compete effectively with other comparable services offered in the system. Therefore, pursuant to our authority under Section 612 (c) (4) (A) (ii), we will require cable operators to provide billing and collection services for leased access cable programmers, unless operators can demonstrate the existence of third party billing and collection services which in terms of cost and accessibility, offer leased access programmers an alternative substantially equivalent to that offered comparable non-leased programming.[1298]

[1295] Cox Comments at 45.

[1296] Fox Comments at 4-5.

[1297] 5 FCC Rcd 4962, 5051 (1990).

[1298] We have deregulated the provision of billing and collection service provided by a local exchange carrier to third party interexchange carriers. We found that third party billing and collection is not subject to regulation under Title II of the Act, 47 U.S.C. §§ 201-224. We also found that sufficient competition for billing and collection service exists in this area to allow market forces to discipline excessive rates or unreasonable practices, and that the ability of users to do their own billing and collection would have a significant impact on the rates for this service. Detariffing of Billing and Collection Services, 102 FCC 2d 1150, recon. denied, 1 FCC Rcd 445 (1986); see also Public Service Commission of Maryland, 4 FCC Rcd 4000 (1989), aff'd on other grounds sub nom., Public Service Commission of Maryland v. FCC, 909 F.2d 1510 (D.C. Cir. 1990). In the record before us, however, we have little specific data on the existence of competitive providers for billing and collection services for

If an operator can make such a showing, it would still be required to the extent technically feasible, to make available data necessary to enable that third party to bill and collect, e.g, billing name and address of subscribers.

505. We are not adopting specific rules at this time relating to the rates that might be charged for billing and/or collection services. Competition, where it exists, in the provision of services of this type will set an upper bound on charges by cable operators. Moreover, we believe that cable operators will have the incentive to quote reasonable and competitive rates in order to obtain the additional revenues that billing and collection services could generate for them. If disputes arise, however, we will address what constitutes a maximum reasonable rate for billing and collection on a case-by-case basis, bearing in mind statutory objectives in this area and the individual circumstances, e.g., number of subscribers to be billed, implicit charges to non-leased access services for comparable billing and collection, and prices charged by competitive billing and collection providers.

3. Leased Access: Maximum Reasonable Rates

a. Leased Access

i. Background

506. Section 612(c)(4)(A)(i) of the Communications Act requires the Commission to determine the maximum reasonable rates that a cable operator may impose for leased commercial access.[1299] In the Notice we identified, and sought comment on, three alternative basic methodologies for determining the maximum reasonable rates for leased commercial access: benchmark rates based on costs or rates of typical cable systems; reliance on cost-of-service rate-base principles; and market-based approaches. We also discussed and solicited comments on the fourth possibility of establishing a mechanism or formula under which subscriber rates for the basic service tier and/or cable

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leased access cable programmers. Viacom states that it contracts with CableData for its billing and collection services and represents that there is currently a wide variety of billing and collection services in the market. Viacom Reply Comments at 17-19. It does not, however, address what impact forcing a channel user to duplicate this billing system would have on the potential for the creation of programming competition through the use of leased channels. The remainder of the record is silent on this issue.

[1299] See Conference Report at 68.

programming services could be used to compute a rate for leased commercial access.[1300]

ii. Comments

507. While many of the cable operators commenting on this issue support a benchmark approach for basic service tier rates, they reject average benchmarks for leased access, claiming that reliance on benchmarks would ignore critical differences among cable systems and that any average-based methodology will cause programmers who contribute the most financially to cable systems to migrate to leased access channels.[1301] Generally the cable operators support only a system specific maximum reasonable rate that considers the programming on that system, the fees paid by programmers to put such programming onto the system, and the programming that potential leased access programmers intend to put onto the system. Comcast, NCTA, TCI, TimeWarner, and Cole, all propose that the maximum reasonable rate for any system should be no lower than the highest net fee or implicit fee paid by any programmer already on the system. Continental suggests a variation of this that would allow the maximum reasonable rate for a potential leased access programmer on any system to be set at the highest net fee the operator collected for a similar class of channels within the previous year. Both of these methodologies, proponents claim, would prevent migration.

508. CIC and Cox suggest that the Commission should adopt a benchmark approach that would permit the parties to negotiate below the benchmark or to justify charges above the benchmark for identifiable incremental costs of leasing. Under their approach, as a minimum, the operator must be allowed to charge "a monthly lease rate equivalent to its per-channel benchmark for cable programming services multiplied by the number of subscribers to the system," and it must be permitted to claim some percentage of advertising, sales, or other revenues derived by the lessees. It is not clear, however, where the benchmark should be set--for instance, at the highest rate for programming services or at the average rate.[1302]

[1300] 8 FCC Rcd at 540-541, paras. 147-152.

[1301] Armstrong Comments at 38-39; Cablevision Reply at 23-25; CIC Comments at 42-45; Cole Comments at 63-64; Cole Reply at 40; Comcast Comments at 55; Continental Comments at 81-82; Continental Reply at 40; InterMedia Comments at 39-40; Intermedia Reply at 6-7; NCTA Comments at 87-93; TCI Comments at 73-74; TCI Reply at 72-74; TimeWarner Comments at 99-101; TimeWarner Reply at 75.

[1302] CIC Comments at 42-45. Cox Comments at 38-40.

509. MCATC, which filed Comments recommending that the Commission establish a benchmark/maximum rate, in its Reply supports the use of an implicit rate as proposed by NCTA. It recognizes, however, that the implicit rate need not be the same for all programmers; in deriving the rate, a distinction should be made between services to be provided. For example, the rate for a premium cable service should be compared to the rate for premium service, while the rate for programmers offering service to all subscribers should be derived from the implicit rate for programmers providing services to all subscribers.[1303] MEA asserts that a rate methodology based on the nature of the programming and the type of revenues generated, if any, was most likely to gain the support of cable operators in developing the lease access market. It recommends that the Commission establish maximum reasonable rates for various categories of use (e.g., maxi-pay service, pay-per-view, advertiser-supported, not-for-profit), and proposed specific rates for each category. It claims that uniform, cost-based pricing would undermine program diversity, especially for not-for-profit programmers.[1304] In its Reply, MEA agrees with those cable operators proposing that existing payment arrangements between cable operators and programmers on their systems could be viewed as implied charges for access. MEA also stated that the application of the implicit rate methodology to different channel classifications, as proposed by Continental, is a more reasonable approach than those proposals that would apply one implicit maximum rate to all programming. MEA, however, disagrees that each operator's benchmarks should be the highest implicit rate for each programming classification. Rather, it claims, they should be set lower than the maximum.[1305]

510. Both CFA and MEA disagree with operator claims that the Commission must, because of the migration threat, set the maximum reasonable rates no lower than the highest implicit rate currently charged by an operator. CFA and MEA claim that current rates are too high and the implicit rates for leased access would be distorted because of the monopsony relationship between cable operators and programmers and the monopoly relationship between cable operators and subscribers. Both claim that the leased access option is intended to prevent cable operators from maintaining the monopolistic prices they currently charge. CFA claims that migration and the threat of migration would not have the detrimental effects claimed by operators but would effectively provide healthy competition to the cable operator and would be instrumental in permitting the programming

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[1303] MCATC Comment at 40-42; Reply at 6-7.

[1304] MEA Comments at 2-18.

[1305] MEA Reply at 6-12.

market to function more like a competitive market. MEA, however, recommends that the Commission bar migration. Such a bar, it claims, would make unnecessary the cable operators' request that they be permitted to charge the highest implicit access fee to prevent migration.[1306]

511. Several parties support a cost-based approach to setting the maximum reasonable rates. CFA advocated using a per channel pricing mechanism consistent with the cost-based formulaic approach it has proposed in its comments for basic service.[1307] Fox states that rates should not exceed the cost-of-service as outlined in the Notice.[1308] NYNEX claims that a simplified cost-of-service methodology should be applied to initialize rates, after which a price-cap methodology should be applied for increases in rates. NYNEX also contends that rates should be nondiscriminatory. Similarly situated customers, it asserts, should be treated the same, and discrimination based on competitive considerations should be strictly prohibited. NYNEX also states that cable operators should be required to accept any reasonable offer for leased capacity as well as for any excess capacity beyond the set aside.[1309] Similarly, CBA recommends that discrimination should be barred by requiring cable operators to charge all users the same amount for leased access. Further, it argues that, when leased access capacity remains unused because prospective users claim they cannot afford the price, there should be a presumption that the price is unreasonably high and does not meet a market test.[1310]

iii. Discussion

512. While benchmarking is generally considered a relatively less burdensome ratemaking methodology, little data are currently available for establishing leased access benchmarks. Because there has been scant use of the leased access channels, it is questionable that sufficient data could be obtained to establish effective and fair benchmarks. Further, as observed in comments to the Notice, some migration to leased access is possible. It is uncertain what the effect of such migration will be on the existing structure of the cable industry. Considering the lack of data essential to effectively

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[1306] CFA Reply at 76-79; MEA Reply at 5-12.

[1307] CFA Comments at 151.

[1308] Notice, 8 FCC Rcd at 541, paras. 149-151; Fox Comments at 5.

[1309] NYNEX Comments at 19-22; NYNEX Reply at 19-20.

[1310] CBA Comments at 1-3.

assessing the effect of this option and to calculating the benchmarks, we do not find this option to be feasible at this time.

513. The cost-of-service option would likely require extensive accounting, recordkeeping, and costing requirements. We find that it is difficult to justify the cost of this approach, particularly when we are not also requiring it for basic tier rate determinations. It is also possible that substantial migration will occur under this approach, with uncertain and possibly harmful effects on the structure of the industry.

514. When we solicited comments in the Notice on the possibility of establishing marketplace rates for leased access, we stated that where a competitive market exists for leased commercial access, cable operators would be able to charge the market rates for leased access. No comments were received indicating that any competitive market for leased commercial access exists, and we are not aware of any. Consequently, this option does not appear to offer any promise as a tool for setting rates at this time.

515. The record, however, has revealed a fourth option that we believe will enable us to define maximum reasonable rates that a cable operator may charge for commercial leased access that will assure that "the price...of such use will not adversely affect the operation, financial condition or market development of" cable systems and will still enable commercial leased access to become the source of program diversity and of competition to cable operators that Congress intended it to be.[1311] The option, a variation on the fourth option we discussed in the Notice, uses the subscriber rates for basic, cable programming and premium services and the rates the cable operator pays to obtain the programming on those tiers of services to define maximum reasonable rates. We adopt this standard as an initial guide until we gain more experience in this area.

516. As a first step to setting maximum rates that will achieve the potentially conflicting goals of Section 612, we conclude that it is necessary to separate programmers seeking to lease commercial access channels into three distinct categories--those proposing to charge subscribers directly on a per-event or per channel basis to view their programming; those proposing to use the channel for more than fifty percent of their lease time to sell products directly to customers (e.g., home shopping networks, infomercials); and all others. We will require cable operators to charge different maximum monthly access rates to each category of programmers.

[1311] Communication Act, § 612 (c)(1), 47 U.S.C. § 532 (c)(1).

517. By examining the existing payment arrangement between a cable operator and nonaffiliated providers of programming on the operator's system, it is possible to determine the monthly price per subscriber that a cable operator pays to carry that programming. It is also relatively simple, at least within broad categories, to determine the monthly price subscribers pay to view that programming. With certain refinements, the difference between those two prices can be viewed as an implicit fee that the programmer pays to be carried on that system. For each of the three categories of programmers defined in the preceding paragraph, we will require a cable operator to identify the programmers it carries on non-leased access channels that would also fall into that category. The cable operator must calculate the implicit fee charged each such programmer and identify the highest fee among them. That fee will be the maximum rate that the cable operator may charge a programmer in that category for commercial leased access.

518. The implicit fee for a contracted service should recover the value of channel capacity only. Thus it should not include fees, stated or implied, for services other than the provision of channel capacity (e.g., billing and collection, marketing, or studio services). If the contract used to substantiate a maximum reasonable rate requires the cable operator to provide, in addition to channel capacity, other services for which the payment bases are not separately set out in the contract, reasonable adjustments must be made to exclude the value of the other services when the implicit rate is calculated. Once these adjustments are made to the monthly per subscriber rate the operator is paying the programmer to carry its programming, the implicit fee can be determined through a two-step calculation. First the operator should subtract the adjusted rate from the rate per month that a subscriber pays to receive the programming. Then it should multiply this difference by the percentage of its subscribers able to receive that channel or programming. The result is the implicit fee per subscriber for use of the channel.[1312] For each of the three program

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[1312] Thus, if a cable operator pays a premium channel programmer $4.00 per subscriber for its programming and charges a retail price of $10.00 to its subscribers, of whom 25 percent subscribe to the premium channel, then the implicit fee per subscriber is:

[($10.00 - $4.00 x .25] = $1.50.

If a cable operator carries a public broadcasting station on its basic tier, it pays nothing for the programming. Assuming there are 20 channels on the basic tier, and the monthly rate for basic tier service is $10.00, then a subscriber fee to view this channel is $.50. Because all its subscribers subscribe to the basic tier,

categories, the highest of these fees would be the maximum monthly leased access rate per subscriber that the operator could charge a programmer. Maximum rates for shorter periods can be calculated by prorating the monthly maximum rate.

519. We conclude that, at least initially, maximum leased access rates based on the highest implicit fee charged any nonaffiliated programmer within the same category constitutes a reasonable approach to determine rate ceilings for commercial leased access.[1313] We believe such rates are fair because they are derived from the highest market value of channel capacity for the system. Notwithstanding the possible existence of a monopsony relationship between the operator and the programmer paying the maximum, the amount paid or otherwise foregone by any unaffiliated programmer would nevertheless substantiate a maximum value of at least that amount for channel capacity. Lower rates could, of course, be negotiated.

520. We are requiring cable operators to calculate the maximum reasonable rates for each rate classification annually based on the contracts in effect in the previous calendar year. A schedule of rates shall be provided on request to prospective leased access programmers. In addition, operators shall maintain, for Commission inspection, sufficient supporting documentation to justify the scheduled rates, including supporting contracts, calculations of the net implicit fees, and justification for all adjustments.[1314]

521. We expect that setting maximum rates on this basis will eliminate uncertainty in negotiations for leased commercial

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the implicit monthly fee per subscriber for access to this channel is:

$$[(\$0.50 - \$0.00) \times 1.00] = \$0.50.$$

We observe that, where necessary to determine the value to a subscriber of a single channel on a tier, the rate calculation described above contemplates dividing the cost of the total tier by the number of channels located on that tier.

[1313] If the operator carries no unaffiliated programmer in the category for which leased access is sought, the leased access rate may be based on the highest implicit fee charged for that classification by a cable system with the same number of subscribers, of total channels and of satellite channels.

[1314] The Commission will follow its procedures for treatment of proprietary information, see 47 C.F.R. § 0.459, where the cable operator asserts proprietary information is necessary to justify the schedule of rates.

access. It will also automatically lower the starting point for negotiations for a substantial number of potential programmers who are not in the same programming classification as those paying the highest implicit fee, and, in some cases the maximum rate per subscriber will be no more than a small portion of the basic service tier fee. Thus, we are making our decision in this matter based on an expectation that, under these conditions, interest in the use of the leased access market will rise because rates will be low enough to entice programmers, particularly in the programming classifications with the lower implicit fees, to use leased commercial access. Further, as use of lease access capacity at lower rates increases, operators will have an incentive to encourage entrance of new programmers in higher rate classifications in order to maximize the revenue they receive from their leased access capacity.

522. This approach to setting maximum reasonable leased access rates will impose a minimal regulatory burden on cable operators. Maximum rates will not only be readily determinable by each operator with no burdensome accounting and costing requirements, but they will also be easily verifiable by regulators, or by mediators under an Alternative Dispute Resolution proceeding, who will generally need only to review the supporting documentation for rate calculations and, subject to appropriate safeguards to protect proprietary information, the contracts between operators and programmers on non-leased access channels.

b. Access Rates for Not-for-Profit Programmers

i. Background

523. In the Notice, we sought comment on whether the Cable Act of 1992 empowers us to set a lower maximum rate for leased commercial access for not-for-profit programmers, whether lower rates for not-for-profit organizations could help create the diversity of programming sources sought by the drafters of Section 612, and whether there is a need for special rates for not-for-profit programmers. We also asked to what extent we can permit an operator's costs of providing leased commercial access to not-for-profit programmers to be recovered from other leased access customers or from cable subscribers on all tiers generally. Finally, we sought comment on the impact special rates for not-for-profits would have on subscribers and on programmers.[1315]

524. We observed in the Notice that the legislative history of the Cable Act of 1984 indicates that Congress may have contemplated that cable operators be permitted to establish separate leased commercial access rate ceilings for different

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[1315] 8 FCC Rcd at 541, para. 153.

categories of programmers. We noted that Congress' stated intent was not to impose on cable operators the requirement that they make set-aside capacity available on a non-discriminatory basis. Additionally, Congress specifically indicated its concern that one rate for all leased access users would render it impossible for certain classes of service, "such as those offered by not-for-profit entities," to have any reasonable access to a cable system.[1316]

ii. Comments

525. Cable operators responding on the not-for-profit programmer issues generally agree that there is no evidence that the Cable Act of 1984 or the Cable Act of 1992 authorizes the Commission to set preferential rates for the not-for-profit programmers or to cause operators to receive anything less than a fair profit for the use of channel capacity.[1317] Other respondents, however, indicate that they do not oppose discriminatory pricing for not-for-profits or state their belief that the Commission is authorized to set preferential prices for not-for-profit programmers.[1318] CFA assures that discriminatory pricing is permitted in order to effectuate Congress' intent of increased diversity, not merely to bestow a benefit on all non-profit programmers, and it urges the Commission "to adopt, where necessary[,] lower maximum rate ceilings for qualified non-profit programmers."[1319] MEA states that not-for-profit organizations need lower rates and that Congress intended that lower rates be set for them. MEA also recommends that, to further implement congressional intent, there should be a temporary (three year) set-aside of capacity for not-for-profits. This is necessary, it claims, to assure leased access capacity will be available to them once they have raised the necessary funds to begin program delivery over leased access channels.[1320] CBA states that cable

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[1316] See 1984 House Report at 51.

[1317] CIC Comments at 51; Comcast Comments at 56; Cole Comments at 65; Cole Reply at 40; Continental Comments at 82-83; Continental Reply at 40; Cox Comments at 47; TCI Comments at 75-76; TCI Reply at 78-80; TimeWarner Comments at 102-104.

[1318] AAPTS Comments at 2-7; MAAC Comments at 4; NATOA Comments at 93.

[1319] CFA Comments at 151-155; CFA Reply at 79-80.

[1320] MEA Comments at 17-19; MEA Reply at 12-15; MEA observes as well that letter filings to the Commission attesting to the need for lower rates to allow non-profit organizations to gain access number over 100. MEA Reply at 15, n. 42. Additionally, Denver and USCC have filed replies attesting to this need and generally

operators should be required to charge all users the same amount for leased access, but adds that local programming by low power television stations is of such public importance that leased access for stations with a significant amount of such programming should be provided at the preferential rates charged non-profit and other groups whose service provides special public interest benefits.[1321]

iii. Discussion

526. The procedure we adopt in this proceeding for determining the maximum reasonable leased commercial access rates, reduces the need to specify any preferential rates for not-for-profit organizations. We believe that the maximum reasonable rates we have authorized for leased commercial access are responsive to the intent of Congress that leased commercial access be available to all potential programmers in a manner that will encourage diversity of programming and in the sources delivering that programming. At the same time, it responds to those who believe that special rates are required for not-for-profit programmers. Our rules, we believe, will define reasonable rates for potential new, not-for-profit programmers that will be lower than those for most, if not all, commercial programmers. We expect that these rates should generally be the lowest maximum rate of any potential leased access programmers on any system or will, at any rate, be sufficiently low as to attract potential not-for-profit programmers. This expectation, along with the expectation that adequate provision has been made for not-for-profit programmers under Section 611 of the Communications Act, also precludes the need for any interim special set aside for not-for-profit organizations as suggested by MEA.

4. Leased Access Reporting Requirements

i. Background

527. The Notice solicited comment on whether we need to require annual reporting of limited data for monitoring the effectiveness of the leased commercial access rules. Specifically, we proposed collecting the following: channel capacity required to be designated for leased use;[1322] percentage

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supporting MEA's Comment filing. Denver Reply at 6-7; USCC Reply at 1-2.

[1321] CBA Comments at 1-4.

[1322] Section 612(b)(1) requires that the leased access capacity designated for commercial use by unaffiliated persons be in specified amounts determined as a percentage of the total activated

of set-aside capacity used; percentage used by not-for-profit programmers; and actual rates charged leased access users. We proposed imposing these reporting requirements on all cable operators, but we requested specific comment on whether small systems should be exempt from compliance with some of these reporting requirements.

ii. Comments

528. We have received little comment on this issue; the requirements appear not to be controversial. Among cable operators, Armstrong and InterMedia, observing that there is no generally available information on leased access, state that the collection of leased access data over the next several years will be helpful for determining the reasonableness of rates and the feasibility of developing a benchmark for leased access.[1323] Similarly, MEA observes that no data on leased access were filed in this proceeding. MEA urges, as a minimum, the collection of the data proposed in the Notice. Such data, it states, should be used to monitor leased access activity and should be made publicly available.[1324] CFA also supports the collection of leased access data for monitoring purposes.[1325]

529. Parties responding to the Notice did not directly comment on whether small systems should be exempt from any leased access reporting requirements. NCTA does comment generally, however, that small systems, those with 1000 or fewer subscribers, should be exempt from burdensome accounting and data collection requirements.[1326] Similarly, CATA, making a direct reference to the kind of requirements laid out in Appendix B to the Notice, but not to the leased access reporting proposal, states generally that the kind of cost justification questions posed in this proceeding should not apply to small cable television systems.[1327] Neither, however, states whether the proposed leased access reporting requirements would be burdensome for small systems.

iii. Discussion

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channels on the system. Communications Act, § 612 (b) (1), 47 U.S.C. § 532 (b) (1).

[1323] Armstrong Comments at 38-39; InterMedia Comments at 39-40.

[1324] MEA Comments at 8 and 28; MEA Reply at 10-11.

[1325] CFA Comments at 155.

[1326] NTCA Comments at 82-84.

[1327] CATA Comments at 23.

530. It appears that the leased access requirement added to the Communications Act in 1984 has not created "the widest possible diversity of information sources" intended by Congress when it amended the Communications Act in 1984 to include this requirement.[1328] In the Cable Act of 1992, Congress has broadened the purpose of the set aside "to promote competition in the delivery of diverse sources of video programming."[1329] In this proceeding we are setting forth regulations designed to assure that the leased access option brings about the intended diversity of programming and competition in programming delivery. Because few programmers have exercised their option to lease access since 1984, we believe that it is important to monitor this market and to make timely adjustments to the rules if necessary. Thus, although we are not adopting specific reporting requirements in this Report and Order, we intend to incorporate into our general reporting and monitoring process mechanisms for obtaining specific information on leased channel usage and rates. We believe it may be possible to efficiently collect such information as part of the process in which data relating to system rate and financial information are collected for purposes of compliance with Sections 623(g)(collection of information) and (k)(reports on average prices) and will address the gathering of leased access data in that context.

5. Leased Access: Procedures for Resolution of Disputes

i. Background

531. Section 612(c)(4)(A)(iii) of the Cable Act requires us to establish procedures for the expedited resolution of disputes concerning rates or carriage on leased access channels.[1330] The legislative history of Section 612(c)(4)(A) indicates that Congress believed that the existing provisions of the Cable Act of 1984 entitling aggrieved users to bring action in federal district court or to file complaints at the Commission resulted in procedures that were too cumbersome. Congress concluded that these provisions, together with a high burden of proof on access providers, may have limited demand for leased access.[1331] The Notice proposed procedures for addressing petitions for relief by leased access providers alleging that

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[1328] Communications Act, § 612 (a), 47 U.S.C. § 532 (a).

[1329] See Conference Report at 68.

[1330] Communications Act, § 612(c)(4)(A)(iii), 47 U.S.C. § 532(c)(4)(A)(iii).

[1331] House Report at 39-40.

the operator's rates or terms and conditions for use of leased channel capacity violated our rules. We also sought comment on whether to devise procedures for emergency, time-sensitive cases, on the use of Alternate Dispute Resolution ("ADR") to dispose of leased access petitions, and on the role the local franchising authority might have in such dispute resolution.[1332]

ii. Comments

532. Commenters generally support our underlying goal of expediting the resolution of disputes involving leased access channels.[1333] In order to achieve this goal, some cable interests suggest using the general procedures available for petitions for special relief under our current cable regulations.[1334] MEA opposes this proposal, arguing that the pleading cycle under these is too long for leased access disputes.[1335] NATOA stresses that our regulations should be easy to administer and should not unduly burden those complaining about a denial of reasonable rates, terms, and conditions.[1336] Some cable interests emphasize that the 1992 Cable Act did not revise the existing presumption contained in Section 612(f)[1337] that the rates, terms and conditions for use of access channels are reasonable and in good faith unless shown by clear and convincing evidence to the contrary.[1338] Cable interests argue that expedited procedures to resolve leased access channel disputes obviate the need for emergency procedures.[1339] MEA,

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[1332] Notice, 8 FCC Rcd at 543-544, paras. 166-170.

[1333] See, e.g., Blade Comments at 26; Continental Comments at 87.

[1334] 47 C.F.R. §76.7. See Cole Comments at 69; TCI Comments at 77-78.

[1335] MEA Reply at 23.

[1336] NATOA Reply at 8 n.7.

[1337] Communications Act, § 612 (f), 47 U.S.C. § 532 (f). The statute states "In any action brought under this section in any Federal district court or before the Commission, there shall be a presumption that the price, terms, and conditions for use of channel capacity designated pursuant to subsection (b) are reasonable and in good faith unless shown by clear and convincing evidence to the contrary."

[1338] Cox Comments at 50; CIC Comments at 53.

[1339] Comcast Comments at 57; TCI Comments at 79; TimeWarner Comments at 105; Continental Comments at 89.

however, thinks oral rulings could provide meaningful relief for time-sensitive programming such as political advertisements, live concerts, sporting events, and holiday specials.[1340] All parties commenting on the issue support the use of ADR as long as both parties agree to its use.[1341] Cable interests generally oppose the involvement of local authorities in the resolution of leased channel access disputes[1342] while municipalities believe they should have this option.[1343] Cole believes that Section 612(c)(4)(A)(iii) of the Act preempts local authority involvement,[1344] while Cox argues that local authorities do not have the resources and expertise to resolve such disputes.[1345]

iii. Discussion

533. Review of leased access rates or terms and conditions will be triggered by the filing of a complaint with the Commission. In order to ensure that complaints are timely, thus guarding against determinations based on a stale record, and to forestall development of patterns of abuse,[1346] we will require that petitions be filed within 60 days of the alleged violation.[1347] This requirement minimizes the possibility of changed circumstances, such as availability of channel capacity, intervening and thereby making a remedy more difficult to implement.[1348] Second, this 60-day period will afford the

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[1340] MEA Reply at 24.

[1341] See e.g. Cole Comments at 70; TCI Comments at 78. See also MEA Comments at 24.

[1342] LeBoeuf Comments at 6-7; Cox Comments at 51; CIC Comments at 54.

[1343] See e.g. NATOA Comments at 94; Hays Reply at 6; Madison Reply at 5; Mankato Reply at 5; Marshall Reply at 4; Metro Dade Reply at 9; Oakland Reply at 4; San Antonio Reply at 5.

[1344] Cole Comments at 70.

[1345] Cox Comments at 51; CIC Comments at 54.

[1346] Notice, 8 FCC Rcd at 543, para. 167.

[1347] Continental Comments at 88; Cole Comments at 70. Of course, when a continuing violation is involved, complaints may be filed at any time based on current information.

[1348] TCI Comments at 78.

parties a brief but reasonable period of time to resolve the dispute without governmental involvement.[1349]

534. The procedures we adopt for streamlined resolution of leased access disputes are based on the general approach proposed in the Notice. A petitioner will be required to state concisely the facts constituting a violation of our leased access rules,[1350] and the specific rule or regulation allegedly violated and to serve a copy of the petition on the operator. The cable operator would have 30 days from the date of filing the petition in which to respond.[1351] In the case of a rate dispute, an operator would be required to submit data showing that the rate charged was not higher than the highest implicit fee it charged for a comparable category of service. We would also require the operator to submit the affidavit of a responsible company official to support such a response. If, after the operator's submission, we find a prima facie violation of our rules, the operator might then be required to produce additional information.[1352]

535. After the evidence has been submitted, in order for us to grant relief, the complainant must show by clear and convincing evidence that the operator has violated our leased access rules or otherwise acted unreasonably or in bad faith.[1353] For successful complainants, such relief could take various forms, including, but not limited to, refunds,[1354] and injunctive measures. We will also use, where necessary, forfeitures.[1355]

[1349] We encourage parties to attempt to resolve their disagreement through informal means such as through the Alternative Dispute Resolution Process.

[1350] In the case of a rate dispute, a petitioner would have to allege that a given rate was higher than the maximum reasonable rate permitted under our rules.

[1351] We will apply 47 C.F.R. § 1.4 to compute filing times in all cases, including service by mail.

[1352] Notice, 8 FCC Rcd at 543, para. 165.

[1353] Communications Act, § 612 (f), 47 U.S.C. § 532 (f).

[1354] We believe that refunds are a form of relief necessary to ensure the "expeditious resolution of disputes" required in Section 612(c)(4)(A)(iii). For example, it will enable a leased access provider to obtain access while a dispute is pending, because any access charge can later be refunded.

[1355] Communications Act, §§ 503(b)(1)(B) and (2)(A), 47 U.S.C. §§ 503(b)(1)(B) and (2)(A).

We agree with Cox and CIC that while the 1992 Cable Act authorizes the Commission to implement expedited resolution procedures, there is no indication that Congress intended to change the burden of proof set forth in Section 612(f) of the Act,[1356] and our procedures do not change this statutory burden.[1357]

536. We agree with cable interests that our expedited leased access procedures may obviate the need for oral rulings or other emergency processing of leased access disputes.[1358] We decline to establish procedures for such emergency treatment at this time. We do, however, require that pending resolution of a dispute, the operator be required to provide access[1359] if the leased access provider is willing to take access under the rates, terms and conditions set by the operator, subject to any refund or other relief we order.[1360]

537. The Notice tentatively found ADR[1361] might be a

[1356] Cox Comments at 50; CIC Comments at 53.

[1357] Pursuant to statutory direction, our rules regarding leased access rates, terms and conditions, provide specific guidelines as to what is a reasonable practice in the provision of leased access. If an operator's rates, or terms and conditions of use for leased access are proved by clear and convincing evidence to violate our leased access rules or regulations, which rules establish what is or is not reasonable conduct, this would fulfill the complainant's burden of proof within the meaning of Section 612(f). Cf. Lowe v. General Motors Corp., 624 F2d 1373 (5th Cir. 1980) (statutory violation found to be negligence per se and, therefore, unreasonable conduct). As described above, a sufficient allegation of such a violation shifts the burden of production to the operator, who must then come forward with evidence showing conduct in keeping with our rules. We believe that our procedures harmonize the existing presumption in Section 612(f) with Congress' more recent concern that cumbersome leased access procedures have deterred use of such capacity.

[1358] Comcast Comments at 57; TimeWarner Comments at 105; TCI Comments at 78; Continental Comments at 89; See also Cole Comments at 69.

[1359] MEA Comments at 35.

[1360] Cole Comments at 70; TCI Comments at 78.

[1361] Alternative Dispute Resolution refers to procedures for deciding controversies in lieu of formal adjudications, as defined in the Administrative Dispute Resolution Act, 5 U.S.C. § 582(c) (1990). These procedures include, but are not limited to,

more appropriate means of resolving conflicts by offering both expedition and cost-effectiveness.[1362] Commenters generally agree that ADR should be used so long as all parties voluntarily agree to it.[1363] We continue to believe that ADR can provide parties with an exceptionally swift and economical way to resolve a dispute, and we strongly encourage parties to a leased access channel dispute to use ADR in lieu of adjudication before the Commission[1364]. As the record consensus suggests, because ADR is voluntary, parties may elect it at any time.[1365]

538. NATOA and other municipalities argue that local authorities willing to mediate disputes or enforce Commission leased access requirements be permitted to do so.[1366] On the other hand, some cable interests oppose such involvement by the local authority. TCI and Cole take the position that Section 612(c)(4)(A)(iii) of the Communications Act preempts local authorities from resolving leased access channel disputes.[1367] Blade and Cox argue that local authorities do not have the resources or expertise to resolve a dispute involving federal

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"settlement negotiation, conciliation, facilitation, mediation, fact finding, minitrials, and arbitration, or any combination thereof." 5 U.S.C. § 581(3).

[1362] Notice, 8 FCC Rcd at 544, para. 168.

[1363] DRG Comments at 8; Cox Comments at 48; CIC Comments at 54; Cole Comments at 70; LeBoeuf Comments at 7; TimeWarner at 76; MEA Reply at 24.

[1364] As noted above in the section addressing cable programming service complaints, parties may contact the Commission's Designated ADR Specialist to obtain information regarding the use of alternative dispute resolution. See note 888 , supra.

[1365] Continental Comments at 89; Cole Comments at 70; TCI Comments at 79. Parties should notify us that they are using ADR and request that the petition be either dismissed or held in abeyance.

[1366] NATOA Comments at 94; Oakland Reply at 4; Garden City Reply at 2; Niles Reply at 2.

[1367] TCI Comments at 79; Cole Comments at 70. Section 612(c)(4)(A)(iii) grants the Commission the authority to "establish procedures for the expedited resolution of disputes concerning rates or carriage under this section."

requirements.[1368] Blade also notes the possibility of inconsistent decisions arising from determinations by multiple franchising authorities.[1369] A local authority, acting as a neutral, can aid the parties in resolving a leased access channel dispute under ADR if all affected parties agree.[1370] Section 612(c)(4)(A)(iii) does not preempt such voluntary agreements. A complainant choosing not to submit to such mediation can have leased access petitions resolved at the Commission. Finally, although local authorities may act as a neutral if all parties agree, the Cable Act does not provide for them to enforce our leased access rules.[1371]

6. Leased Access: Minority and Educational Programmers Alternative

i. Background

539. Section 612(i) of the Cable Act permits a cable operator to place programming from a qualified minority or educational programming source on up to 33 percent of the cable system's designated leased access channels. Programming carried by a cable system as of July 1, 1990 does not qualify as minority or educational programming for purposes of this section.[1372] In the Notice, we tentatively concluded that, for purposes of the minority programming provision, programming that covers "minority viewpoints" or is directed at members of "minority groups" would have to cover the viewpoints of or be targeted to members of the

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[1368] Blade Comments at 26; Cox Comments at 51; CIC Comments at 54.

[1369] Blade Comments at 26.

[1370] Under ADR, "neutrals" can arbitrate disputes. A "neutral" with an official conflict of interest may serve if such interest is fully disclosed and all parties agree. 5 U.S.C. §§ 581, 583, 587. We recognize that there could be inconsistent decisions by the various local authorities. However, under the Administrative Dispute Resolution Act, these decisions will be limited in their impact to the parties and would not be precedent for other local authorities or the Commission. 5 U.S.C. § 590(e).

[1371] Cf. Section 623(b)(5) (Commission authorized to prescribe procedures by which franchising authorities may enforce Commission regulations governing basic service tier rates).

[1372] Communications Act, § 612 (i), 47 U.S.C. § 532 (i).

groups designated as minorities.[1373] We asked parties to comment on this proposal and tentative conclusion. We also proposed to reflect the statutory definition of "educational programming source" in our rules.[1374] The Cable Act qualifies both minority and educational programming sources for leased access under this Section if they devote "substantially all" of their programming to the coverage of minority viewpoints or to educational or instructional programming. We sought comment on how much programming would be enough to fulfill this requirement.

ii. Comments

540. We received little comment on this provision. On the question of how much programming is "substantially all" of a minority source's programming under the statute, Continental proposes that programmers that devote 75 percent of their programming on a weekly basis to minority viewpoints or minority audiences should be deemed to satisfy the standard.[1375]

iii. Discussion

541. As proposed in the Notice, we will reflect the provisions of Section 612(i) in our rules.[1376] For the purposes of the minority programming provision, we conclude that programming that covers "minority viewpoints or is "directed at members of minority groups" has to cover the viewpoints of or be targeted to members of minority groups as defined in Section 309(i)(3)(c)(ii) of the Communications Act. Regarding the appropriate proportion of programming that must be devoted to the coverage of minority or educational programming to qualify as "substantially all" under the statute, we believe that

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[1373] The Cable Act defines a qualified minority programming source as one that devotes substantially all of its programming to coverage of minority viewpoints, or to programming directed at members of minority groups, and which is over 50 percent minority owned, as the term minority is defined in Section 309(i)(3)(C)(ii) of the Communications Act. Section 309(i)(3)(c)(ii) identifies Blacks, Hispanics, American Indians, Alaska Natives, Asians and Pacific Islanders as minority groups.

124 Section 612(i)(3) defines a "qualified educational programming source" as one that devotes substantially all of its programming to educational or instructional programming that promotes public understanding of mathematics, the sciences, the humanities, and the arts and has a documented annual expenditure on programming exceeding $15 million.

[1375] Continental Comments at 90.

[1376] See Appendix C.

programming sources that devote 90 percent or more of their programming to such purposes may qualify as a statutory source of minority or educational programming. Contrary to the position of Continental, we believe that "substantially all" denotes a very high percentage of programming devoted to these uses and 75 percent would not be adequate under the statute.

C. Subscriber Bill Itemization

i. Background

542. Section 622(c) of the Cable Act states that:

> Each cable operator may identify, consistent with the regulations prescribed by the Commission pursuant to section 623, as a separate line item on each regular bill of each subscriber, each of the following:
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> (1) The amount of the total bill assessed as a franchise fee and the identity of the franchising authority to which the fee is paid.
> (2) The amount of the total bill assessed to satisfy any requirements imposed on the cable operator by the franchise agreement to support public, educational, or governmental channels or the use of such channels.
> (3) The amount of any other fee, tax, assessment, or charge of any kind imposed by any governmental authority on the transaction between the operator and the subscriber.[1377]

The House Report states that a cable operator shall itemize "only [the] direct and verifiable costs" associated with the above-listed categories of costs and should "not include in itemized costs indirect costs."[1378] The House Report in addition makes it clear that while these costs may be itemized, they are to be included as part of the bill and not simply added to it. The Conference Report adopted Section 622(c),[1379] with the specific amendment that Section 622(c) be construed consistently with our

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[1377] Communications Act, § 622(c), 47 U.S.C § 542(c).

[1378] The House Report states, for example, that a cable operator shall not include in the itemized cost of providing PEG channels the value of such channels if they were used for commercial purposes. House Report at 86.

[1379] The House and Senate versions of Section 622(c) were virtually identical. Conference Report at 84.

rate regulations implementing Section 623 of the Cable Act.[1380] The Notice asked for comment on the interrelationship between Section 622(c) and Section 623. We also sought comment on whether to reflect in our rules the House Report statement that, while authorizing itemization, Section 622(c) does not authorize these charges to be separately billed as if they were not a part of the charge for cable service.[1381]

ii. Comments

543. Many local franchising authorities argue that, in light of the Notice and the House Report, cable companies choosing to itemize under Section 622(c) should be permitted to itemize only direct and documentable costs included in the categories listed explicitly in Section 622(c).[1382] Cable interests agree that the costs categorized in Section 622(c) may be itemized, and also argue that the term "any" within Section 622(c)(3) permits them also to itemize costs not stated explicitly in Section 622(c). For example, they argue that costs incurred for institutional networks,[1383] special municipal video services,[1384] free wiring of public buildings,[1385] governmental

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[1380] Id. at 84. Section 623 of the Act directs the Commission, in devising rules governing basic cable service, to take into account, inter alia: the direct costs of obtaining, transmitting, and otherwise providing signals carried on the basic tier; the properly allocable portion of any amount assessed as a franchise fee, tax, or charge of any kind, or any other fee, tax, or assessment of general applicability imposed by the state or local authority on the transactions between cable operators and subscribers; and, any amount required to satisfy franchise requirements to support or use PEG channels or any other services required under the franchise. Communications Act, § 623(b)(2)(C)(ii), (v), (vi), 47 U.S.C. § 543(b)(2)(C)(ii), (v), (vi).

[1381] Notice, 8 FCC Rcd at 545.

[1382] See e.g., NATOA Comments at 91; Fort Lauderdale Comments at 3; Hays Reply Comments at 4; San Antonio Reply Comments at 4; Austin Comments at 77.

[1383] Cole Comments at 61; TCI Comments at 82; NECTA Reply Comments at 9; Continental Comments at 78.

[1384] Cole Comments at 61; TCI Comments at 82; Continental Comments at 78.

[1385] NECTA Reply Comments at 9.

studios,[1386] municipal voice and data services,[1387] copyright fees,[1388] and retransmission consent payments can be itemized pursuant to Section 622(c).[1389] Some franchise authorities assert that if Section 622(c)(3) permits cable companies to itemize such additional costs, operators should also have to disclose their per-channel programming costs, amounts attributable to the company's operating margin and debt service, and any other items the franchising authority deems appropriate for separate itemization.[1390] Time Warner and TCI disagree. They argue that the statute does not provide for itemization of these costs nor does the legislative history discuss their inclusion.[1391]

544. Franchising authorities generally believe that a subscriber bill should identify one total charge for cable service, within which all the company's costs are included. They envision, for example, the company including a legend in the bill explaining what percentage of the total charge results from Section 622(c) costs.[1392] Cable companies argue, however, that this method would result in "burying" the costs imposed upon them by the authorities. Operators argue that itemization means separately listing the itemized charges beyond the charge identified in the bill as the charge for cable service.[1393]

iii. Discussion

1. Content

[1386] Id.

[1387] Cole Comments at 61; TCI Comments at 82; Continental Comments at 78.

[1388] NECTA Reply Comments at 10; Harron Comments at 9-10; But see MCATC Comments at 26-27; Boston Reply Comments at 10-11.

[1389] See e.g., Adelphia Comments at 84; Comcast Comments at 61-62.

[1390] NATOA Comments at 92-93; Dearborn Reply Comments at 4; Grand Junction Reply Comments at 4; Hays Reply Comments at 5.

[1391] Time Warner Reply Comments at 81; TCI Reply Comments at 82.

[1392] See e.g., Austin Reply Comments at 70; MCATC Comments at 28.

[1393] See e.g., Harron Comments at 5; TCI Comments at 80; Newhouse Comments at 31-34; Adelphia Comments at 88-89; Falcon Comments at 49-53.

545. We understand that the purpose of Section 622(c) is to assure that there are no regulatory obstacles placed in the way of cable systems identifying certain governmentally imposed costs on subscriber bills. System operators are not required by this provision to undertake any such itemization, nor does the provision, by itself, preclude the itemization of additional costs (whether or not governmentally imposed) or otherwise mandate that subscriber bills have any particular format or content.[1394] Rather, Section 622(c) has to do with increasing political accountability for regulatory costs imposed, by permitting subscribers to be informed that a portion of their bills are related to governmentally imposed obligations. As Senator Lott stated in introducing the eventual final version of Section 622(c) as an amendment to the Senate bill:

> I would like to offer my amendment...dealing with subscriber bill itemization, to give the cable companies an opportunity to itemize these so-called hidden costs to explain to people what is involved in the charges so they will know it is not just the cable company jacking up the prices....The fact is sometimes the rates have gone up because of hidden, unidentified increases in fees or taxes which the cable [company] has to pay and ... passes on to the consumers ....[1395]

Thus, we conclude that the purpose of Section 622(c) is to ensure that cable operators are not prevented, by a franchise agreement or otherwise, from itemizing the specific costs enumerated in that section.

546. With respect to which costs may be itemized under Section 622(c), the provision is quite specific in covering franchise fees; public, education, and governmental channel costs; and fees of any kind imposed on the transaction between the operator and subscriber. The House Report indicates that itemized costs should be direct and verifiable[1396] and the

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[1394] Other provisions of the 1992 Cable Act, however, may have a direct impact on the form and contents of subscriber bills. Thus, for example, the customer service standards required by Section 632(b) address "communications between the cable operator and the subscriber (including standards governing bill and refunds)" and Section 632(c) makes it clear that "consumer protection" laws adopted by States or franchising authorities are not prohibited unless specifically preempted.

[1395] 138 Cong. Rec. S569 (January 29, 1992).

[1396] Cf. Cole Comments at 60-61 (arguing generally that the House Report should not apply); TCI Comments at 79-80 (same); Harron Comments at 9-10 (same); NECTA Reply Comments at 9-11

Conference Report states that itemization is to be consistent with the Section 623 rate regulation provisions adopted by the Commission.[1397] Thus, costs that are itemized include those that are direct and verifiable, as well as a reasonable allocation of overhead, and for PEG costs, the sum of the per-channel costs for the number of channels used to meet franchise requirements.[1398] Therefore, to the extent a franchising authority imposes special costs not of benefit to all subscribers in consideration of the award or renewal of a franchise, these may be included in an itemization as either a franchise fee or PEG cost, as appropriate under the precedents.[1399] If required under a franchise agreement, these costs could include support of institutional

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(same).

[1397] Conference Report at 84. See Sections II.A.(2)(g)AA, supra.

[1398] See e.g., Communications Act, § 623(b)(2), (c)(2), 47 U.S.C. § 543(b)(2), (c)(2).

[1399] Section 622(g) provides that a "franchise fee" may not include, for franchises in effect as of the enactment of the 1984 Act, "payments which are required by the franchise to be made by the cable operator during the term of such franchise for, or in support of the use of public, educational, or governmental access facilities." That section also provides that, for franchises granted after the date of the 1984 Act, capital costs incurred for PEG access facilities may not be included in franchise fees. Thus, such costs would be itemized as PEG costs, or franchise fee costs, in a Section 622(c) itemization. Cf. Clarification of the Cable Television Rules and Notice of Proposed Rulemaking and Inquiry, 46 FCC 2d 175, 204-06 (1974) (prior to 1984 Act's distinction between franchise fee and PEG costs, services required by a franchising authority which benefit only one group of special users must be considered part of franchise fee); In re City of Miami Beach, Florida, Petition for Special Relief, 56 RR 2d 458 (1984) (prior to 1984 Act, extra fees to set up public access organization benefitted only access users of system and had to be considered payment-in-kind and part of franchise fee).

A special tax imposed on rights-of-way, also applicable to other utilities, over and above a franchise fee assessed under a franchise agreement would not be part of a franchise fee itemized pursuant to the definition in Section 622(g). Thus, we disagree with Intermedia that the California possessory interest tax may be itemized under Section 622(c). Intermedia Reply Comments at 6-7.

networks, free wiring of public buildings, provision of special municipal video services and voice and data transmissions.[1400]

Copyright and Retransmission Fees

547. Section 622(c)(3) assures that cable operators may identify as a separate line item on each subscriber bill "the amount of any other fee, tax, assessment, or charge of any kind imposed by any governmental authority on the transaction between the operator and the subscriber."[1401] A number of parties, including Harron and other cable interests, assert that the use of the term "any" in this provision justifies a broad interpretation of "governmental fee or assessment" permitting, for example, itemization of copyright and retransmission consent fees come within the category of fees or taxes imposed by governmental authority. We disagree. Retransmission and copyright obligations are, in our view, no different from all other binding obligations of cable operators to pay those who supply them with goods and services.[1402] They are imposed by

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[1400] NECTA Reply Comments at 9 (all); Institutional networks, municipal video services, municipal voice and data services: Cole Comments at 61; TCI Comments at 82; Continental Comments at 78.

[1401] Communications Act, § 622(c)(3), 47 U.S.C. § 542(c)(3).

[1402] Harron Comments at 8-10; NECTA Reply Comments at 10. Harron observes that a copyright fee is calculated on the basis of gross receipts, based on subscribership. Harron Ex Parte Statements at 1. Comcast Comments at 59; Adelphia Comments at 84; Time Warner Comments at 108; Comcast Comments at 61-62; TCI Reply Comments at 82. Comcast observes that the Act requires channels carried under retransmission consent arrangements to be carried on the basic service tier. Comcast proposes that retransmission consent fees should be subject to the same "sunshine effects" as the items specifically listed in Section 622(c). Comcast Comments at 59-60. Comcast further observes that Section 623(b)(7)(A)(iii) of the Cable Act requires that channels carried under retransmission consent arrangements are to be carried on the basic service tier, and that Section 325(b)(3)(A)(2) requires the Commission to consider the impact of retransmission consent on rates for the basic tier. Comcast Comments at 60. We recognize that there will be costs associated with cable systems complying with their copyright and retransmission consent obligations. These may be identified to subscribers if that is done in a manner that does not conflict with other provisions of the law (e.g. prohibited by franchise agreement). These costs, however, are not the kinds of fees, taxes, assessments, or charges that are the subject of Section 622(c) but rather are consensual arrangements relating the consideration to be paid in exchange for carriage of signals or programming.

government only in the sense that all legal obligations are imposed by government and are different in kind from the tax and regulatory impositions that appear to be the subject of this section.[1403] Thus,, we do not believe such costs are encompassed within the protections of Section 622(c).

548. NATOA and other municipal interests make reference to itemization of costs such as the part of the total bill attributable to the cable company's per channel operating costs, the cable company's payments on its debt service, and the company's operating margin.[1404] These, too, are not costs directly imposed by a governmental authority but rather represent business and operational expenses not encompassed in Section 622(c). To the extent municipal interests are suggesting that identification of additional costs should be a condition attached to the itemization of those costs specifically identified in the statute, we find this to be inconsistent with the objective of Section 622(c) and could discourage the accomplishment of its political accountability objective. Therefore, we do not believe that we may expand its scope. Franchising authorities thus will not be permitted to require operators to itemize costs not explicitly specified in Section 622(c), such as the operator's debt service or per-channel programming costs, as a condition for itemizing the specifically identified governmental obligations.

2. Format

549. Section 622(c) is intended to ensure public disclosure of costs imposed on the cable operator by specific forms of regulation,[1405] so that subscribers can understand what portion of their cable bill or rate increase results from certain types of governmental assessments beyond the cable company's

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[1403] Section 622(g)(2)(E), it should be noted, excludes from the franchise fee definition "any fee imposed under title 17, United States Code." Title 17 includes the copyright law.

[1404] See e.g., NATOA Comments at 92-3; Dearborn Reply Comments at 4; Grand Junction Reply Comments at 4; Fort Lauderdale Reply Comments at 4; MACC Reply Comments at 4-5. See also Coffeyville Reply Comments at 4 (operators should be required to disclose any other items a franchising authority believes are appropriate to itemize); Palm Desert Reply Comments at 4 (same); Phillipsburg Reply Comments at 2 (same); Louisville Reply Comments at 3 (same); Lincoln Park Reply Comments at 4 (same); Hays Reply Comments at 5 (same).

[1405] Comcast Comments at 58; TCI Comments at 79-80; Nashoba Comments at 84; Time Warner Comments at 79.

control.[1406] Cable interests generally urge us not to follow statements in the House Report[1407] that the law does not authorize cable operators to identify costs itemized pursuant to Section 622(c) as separate costs "over and beyond the amount identified as the charge for cable service".[1408]

550. Cable interests are correct that the Conference Report adopts the Senate, rather than the House version of Section 622(c).[1409] However, as some local franchising authorities note, and as the Conference Report points out, the House and Senate versions of Section 622(c) were virtually identical,[1410] and that the Senate Report was silent on the matter of subscriber bill itemization. On the other hand, the House Report gives specific consideration to the format of subscribers' cable bills.[1411] Thus, the silence of the Conference Report on the question of subscriber bill format does not necessarily imply that the intent of the House was overridden. We believe, therefore, that the statement in the House Report should be given weight.

551. The House Report states that:

> The cable operator shall not identify cost itemized pursuant to section [622(c)] as separate costs over and beyond the amount the cable operator charges a subscriber for cable service. The Committee intends that such costs shall be included as part of the total amount a cable operator charges a cable subscriber for cable service. For example, a cable operator might itemize pursuant to [Section 622(c)] a $1.50 per month charge to account for a five percent franchise fee obligation. If a cable operator charges $30 per month for basic cable service, the $1.50 itemized charge shall be included in such amount; the cable operator cannot provide the cable subscriber a basic bill for $28.50, with a $1.50 additional charge added as a franchise fee. Thus, the

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[1406] See e.g., Comcast Comments at 58.

[1407] CIC Comments at 48-50; Continental Comments at 75; Cole Comments at 59; TCI Comments at 79-80; Harron Comments at 5.

[1408] House Report at 86.

[1409] See e.g., Harron Comments at 5; CIC Comments at 48-50; Continental Comments at 75; Cole Comments at 59; TCI Comments at 78-80.

[1410] NATOA Reply Comments at 24 n.24 (citing Conference Report at 84); Austin Reply Comments at 76 (same).

[1411] House Report at 86.

> bill would show a charge of $30, but the cable operator would have the right to include in a legend a statement that the $30 basic cable service rate includes a five percent franchise fee, which amounts to $1.50.[1412]

We also do not believe that Senator Lott's statement regarding the reason for the itemization provision[1413] directly relates to the format subscribers' bills must take.[1414] We further believe that separate billing of such charges would unnecessarily burden subscribers by requiring them to remit separate payments.[1415] Even listing such charges "below the line" would tend to confuse subscribers regarding what is or is not part of their bill.[1416] Thus, any bill itemized pursuant to Section 622(c) may require only one payment for the operator's services on the part of a consumer, the total for which must include all fees and costs itemized pursuant to Section 622(c).

[1412] House Report at 86.

[1413] See supra para. 545.

[1414] See e.g., Austin Reply Comments at 75.

[1415] Harron expresses concern that the rules we adopt governing subscriber bill itemization will complicate its efforts to comply with Section 623(d) of the Cable Act, which requires a cable operator to "have a rate structure...that is uniform throughout the geographic area in which cable service is provided over its cable system." Communications Act, § 623(d), 47 U.S.C. § 543(d). Harron notes that franchise fees and PEG expenses often vary among different franchise areas encompassed within a single service area. Harron Comments at 8-9. However, Section 622(c) addresses merely the form subscribers' bill should take, and not the overall rate structure relevant to Section 623(d). Moreover, we construe Section 622(d) as requiring uniform rates within a franchise area only. See section II.A.5.a, supra. Furthermore, we agree with NATOA that an operator may not quote a rate for cable service in advertisements and other promotional materials that does not include costs itemized pursuant to Section 622(c). NATOA Comments at 92. This prohibition avoids needless confusion on the part of consumers.

[1416] Some franchising authorities express concern that cable companies may use itemization to change the manner in which they calculate franchise fees. See NYSCCT Reply Comments at 6; MCATC Comments at 28-9. Section 622(c) affects the format, not the content of subscriber bills. It is intended to disclose costs attributable to governmental authorities and not to directly affect the amount of these costs.

552. The language of the Act expressly permits the itemization of certain governmentally imposed costs. Beyond the guidelines given above, we are refraining from dictating how a cable operator choosing to itemize may format its bill and implement Section 622(c). We agree with NATOA that local franchising authorities may adopt regulations consistent with those we adopt herein.[1417] However, we underscore that the policy of Section 622(c) is to permit subscribers to be fully apprised of the effect of the enumerated governmentally imposed costs on their bills. It would of course frustrate the intent of the statute if a franchising authority imposed burdensome additional itemization on an operator choosing to avail himself of the rights bestowed by this section,[1418] or otherwise attempted to nullify the effect of a Section 622(c) itemization through local regulations.

D. Cost Accounting/Cost Allocation Requirements.

i. Background

553. In the Notice, we solicited comment on the adequacy of simplified cost accounting and cost allocation requirements for cable systems that could be used to implement the cost-based regulatory alternatives described in the Notice.[1419]

ii. Comments

554. Municipalities, telephone companies, CFA and others agree that the Commission should develop some type of accounting and cost-of-service standards for the cable industry.[1420] Austin, Bell Atlantic, and Bowling Green recommend that the Commission adopt a uniform system of accounts.[1421] Telephone companies urge the Commission to adopt cost allocation

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[1417] NATOA Reply Comments at 23.

[1418] See supra this section.

[1419] Notice, 8 FCC Rcd at 524, para. 55, n.84.

[1420] See, e.g., Austin Comments at 50,72; Bell Atlantic Comments at 6-15; BellSouth Comments at 19; Bowling Green (Carson, Conneaut, Drexel, Keys, Mckinney, NewBern, Paducah, Parsippany, Salisbury, St. Pete, and Williamston) Comments at 18; CFA Comments at 85-86; Multiplex Comments at 11; Municipal Comments at 47-51; NARUC Comments at 4; NJ Comments at 14, 15, 23; NTCA Comments at 4; NYNEX Comments at 1-11; PacTel Comments at 9.

[1421] Austin Comments at 40; Bell Atlantic Comments at 13; Bowling Green Comments at 9.

procedures and other rules similar those applicable to the telephone industry in order to prevent the potential for cross-subsidization between non-cable activities and regulated cable activities.[1422] New Jersey claims that an allocation methodology for allocating joint and common costs to the basic tier is necessary to protect against cost-shifting between the basic service tier and unregulated channels.[1423]

555. Cable operators generally oppose the adoption of accounting and cost allocation requirements and argue that implementing such methodologies would be administratively burdensome, and would require the Commission to employ a uniform system of accounts.[1424] GTE agrees that cost-of-service rate methodologies present numerous administrative difficulties, and they question the validity of such methods since there is no existing accounting requirements or cost allocation procedures applied to cable operators.[1425] Finally, NTCA and CATA state that small cable television systems should be exempt from any accounting and data collection requirements that the Commission may adopt.[1426]

iii. Discussion

556. In Appendix A to the Notice we proposed simplified cost accounting and cost allocation requirements for cost-of-service determinations. Cable operators did not submit extensive comments on cost accounting and cost allocation issues.[1427] A few commenters, however, did recommend adoption of

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[1422] BellAtlantic Comments at 6-15; BellSouth Comments at 19; NYNEX Comments at 1-10; Pactel Comments at 1-6.

[1423] NJ Comments at 14, 15, 23.

[1424] CIC Comments at 13; Cox Comments at 9.

[1425] GTE Comments at 9-10.

[1426] CATA Comments at 23; NTCA Comments at 4.

[1427] Several cable operators commented on the burden associated with reporting information required in Appendix A to the Notice, but did not address the proposals in Appendix A in terms of the appropriate methodology for cost of service determinations. See Adelphia I Reply at 85-87 and TimeWarner Reply at 61-62. Additionally, CATA stated that the kind of cost justification questions posed in Appendix B to the Notice would not properly apply to small cable television systems. CATA Comments at 23.

simplified accounting and costing procedures along the lines of those proposed in Appendix A to the Notice.[1428]

557. The rate regulations we are adopting today impose a price cap on cable service rates with certain categories of costs defined as external to the cap. Cost accounting and cost allocation requirements are necessary in order to assure that costs that we intend to receive external treatment are in fact accorded such treatment. Our regulations additionally authorize cable operators to make cost-of-service showings to justify a rate higher than the capped level. Cost accounting and cost allocation requirements are also necessary to permit identification of costs that will justify a rate above the cap.

558. Cost accounting and cost allocation requirements can significantly affect rates and the way cable operators currently conduct business. For example, requiring that certain categories of costs be directly assigned at the franchise level could prevent cable operators from incurring costs at a higher level as a joint and common cost. Similarly, requiring that costs be directly assigned at the franchise level could effectuate a rate deaveraging throughout the cable industry. Although, the Notice requested comment on the optimum level of rate averaging in the cable industry, little comment was gathered on this point. Accordingly, while we are also adopting in this Report and Order requirements that will permit immediate implementation of our rules, we have determined that we will include in the Second Further Notice issues pertaining what cost accounting and cost allocation requirements we should adopt on a permanent basis. Our goal is a better record that will enable us to decide the appropriate level of cost averaging that should be permitted or required under our rules. These rules will also address the impact on carrier operations of requiring operators to identify costs at given level.

[1428] Several commenters stated their support for the requirements in Appendix A and Appendix B or otherwise stated support for simplified accounting and costing requirements, including: Austin Comments at 50 and 72, and Reply at 53-54; CFA Comments at 85-86; Fairfax Reply at 21-22; GTE Comments at 9-10, and Reply at 15-16; Municipal Comments at 47-51; NJ Comments at 14-23; Muzac Comments at 2-6 and 9; NYNEX Comments at 1-11, and Reply at 10-12; USTA Comments at 15, and Reply at 5 and 9. Other commenters stated support for accounting and/or costing requirements without specifying whether simplified procedures would be adequate, including: BellAtlantic Comments at 6-15; BellSouth Comments at 16-21; Bowling Green, Carson, Conneaut, Drexel, Keys, McKinney, NewBern, Paducah, Parsippany, Salisbury, St.Pete, and Williamson (all, Comments at 18, and Bowling Green Reply at 8-9); Multiplex Comments at 11; NARUC Comments at 4; PacTel Comments at 1-6, and Reply at 5-6; Rocky Comments at 3.

559. The cost accounting rules we adopt today will nevertheless permit a successful immediate implementation of our rate regulations. We require cable operators to identify costs and maintain accounts sufficient for administration of our rate regulations. Cable operators will be required to identify certain locally incurred costs such as franchise fees and local taxes at the franchise level. Instead of mandating that other costs be identified at any level, we require that cable operators, for purposes of calculating external costs and costs in a cost-of-service showing, identify costs at the level at which they identified the category of costs for accounting purposes on April 3, 1993. We require cable operators in any cost-of-service showing to justify and explain this identification and to demonstrate that it is, in fact, the level used to identify costs on April 3, 1993. Costs will then generally be allocated to the franchise level on a per subscriber basis. Costs allocated to, or directly identified at, the franchise level will then be allocated between tiers in proportion to the number of channels on each tier.[1429] Programming costs and retransmission consent fees will be allocated to the tier on which the programming or broadcast signal is offered. Because franchise fee determinations may be revenue, tier, or subscriber sensitive, we require that franchise fees be allocated between tiers and subscribers in a manner most

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[1429] The Cable Act of 1992 requires that in establishing regulations governing rates for the basic service tier we take into account only a reasonable and properly allocable portion, as determined by the Commission, of the joint and common costs of obtaining, transmitting, and providing signals on the basic service tier. Communications Act, § 623(b)(2)(C), 47 U.S.C. § 543(b)(2)(C). Our cost accounting and cost allocation requirements that govern identification of costs at, or allocation of costs to, the franchise level and then allocation between tiers assure that only a reasonable and properly allocable portion of joint and common costs is allocated to the basic service tier because such costs are generally allocated to the basic service tier proportional to the number of subscribers served by the system and the number of channels on the tier. In addition, our methodology for determination of the permitted per channel rate on the initial date of regulation of the basic service tier is, as indicated, tier-neutral and is based on an average of rates across all tiers appropriately weighted for channels and subscribers on each tier. Similarly, our cost allocation requirements between tiers for external costs assures that only a reasonable portion of costs is allocated to the basic service tier. Thus, apart from cost-of-service showings, our framework for regulation of the basic service tier assures that only a reasonable portion of joint and common costs is assigned to the basic service tier. Accordingly, our regulations fully satisfy the statute in this regard.

consistent with the way the franchise fee is assessed by franchise authorities. We believe that this overall approach will minimize rate impacts that could otherwise occur if we adopt more definitive requirements at this time.

III. Further Notice of Proposed Rulemaking

560. As explained above, we have conducted an industry survey of cable systems subject, and not subject, to effective competition. That survey was based on data from systems subject to effective competition under each of the three independent statutory criteria that define effective competition.[1430] Among these criteria are cable systems operating in areas where fewer than 30 percent of the households in the franchise area subscribe to the cable service of a cable system.[1431] As we explain in Appendix E, our survey specifically included a sample of systems in areas expected to have less than 30 percent cable penetration.[1432] The comparison of rates of systems subject to effective competition and those not subject to effective competition based on data from all these systems produces a competitive rate differential of approximately 10 percent.

561. It is possible, however, that exclusion from our sample of rates of systems in low penetration areas may produce a better measure of competitive rate differential. Thus, the low penetration of cable systems in some areas may be attributable to factors other than the presence of competing video distribution services. Cable systems may have low penetration, for example, because they are in the process of being constructed, because costs of providing service in the area are high, making service affordable to fewer potential subscribers, or because of poor business management decisions. In addition, the number of systems in low penetration areas is very small, but the rates of such systems are sufficiently different from the rates of competing systems to significantly affect the competitive rate differential and construction of the competitive benchmark. Thus, as we explain in Appendix E, our preliminary analysis reveals that exclusion from our analysis of rates of systems in low penetration areas would produce a competitive rate differential of approximately 28% percent. For these reasons, we seek comment on whether we should include within the data upon which the competitive rate differential is founded, only rates of systems that face effective competition in the form of competing multichannel service providers.

[1430] See paras. 39-49, supra, for a discussion of these statutory criteria.

[1431] Communications Act, § 623(l)(1), 47 U.S.C.§ 543(l)(1).

[1432] See Appendix E.

562. We solicit comment on whether we should in fact exclude or give substantially less weight to systems in low penetration areas in calculating the competitive rate differential. We seek comment on whether the rates of such systems provide an accurate measure of competitive rate levels. Given the inclusion of such systems in Section 623(l)(1) of the Communications Act, which identifies those systems exempt from rate regulation, we solicit comment on whether we may lawfully exclude the rates of such systems from our competitive rate calculations.

563. If the record demonstrates that excluding the rates of low penetration systems would better reflect competitive rates, and, if making such an exclusion is lawful under the Act, then we propose to further reduce rates. In that event, we seek comment on how we should give effect to the resulting competitive rate differential. Should we redefine the benchmark formula and per channel rate tables? Should the Commission require systems above a new benchmark to lower rates additional amounts to achieve a total rate reduction of approximately 28 percent from pre-regulated levels, and should we phase-in any further rate reductions? What would be the impact on consumers and the industry? We seek comment on whether we should apply any new competitive rate differential in a manner different than that selected in the Report and Order.

IV. Regulatory Flexibility Act Analysis

A. Final Regulatory Flexibility Act Analysis for the Report and Order

564. Pursuant to the Regulatory Flexibility Act of 1980, 5 U.S.C.§§ 601-612, the Commission's final analysis with respect to the Report and Order is as follows:

565. Need and purpose of this action: The Commission, in compliance with §§ 3 and 14 and those portions of § 9 of the Cable Television Consumer Protection and Competition Act of 1992 (the Act) pertaining to rate regulation, adopts rules and procedures intended to ensure cable subscribers of reasonable rates for cable services with minimum regulatory and administrative burden on cable entities.

566. Summary of issues raised by the public comments in response to the Initial Regulatory Flexibility Analysis (IRFA): The Chief Counsel for Advocacy of the United States Small Business Administration ("Office of Advocacy") offers several remarks in response to the IRFA. It reiterates its belief that the "vast majority" of cable operators offer good service at reasonable prices, and that despite its basic good intentions,

rate regulation will adversely affect small cable operators.[1433] Office of Advocacy notes the importance of considering the effect of regulation not only on small businesses but on small governmental jurisdictions, (i.e., any government of a city, town, township, village, school district or special district with a population of less than 50,000) and asked that the Commission respond to this concern in this Final Regulatory Flexibility Analysis. The Commission, as detailed below, has taken measures to alleviate regulatory burdens on small systems. With respect to burdens on local governments, we concur with the Office of Advocacy that, under the Act, if a franchising authority does not request certification, it is not required to regulate. Thus, a franchising authority has the flexibility to decline to seek certification and so avoid enforcing rate regulation. Moreover, the Commission will enforce local rate regulation at the franchising authority's request where the franchising authority lacks financial resources or the legal authority to regulate basic service rates. Similarly, the Commission alleviates some of the burden facing franchising authorities by providing that franchising authorities may rely on the presumption that the cable operator is not subject to effective competition unless they have actual knowledge to the contrary. Moreover, the Commission has endeavored to make the certification form local authorities must use as simple as possible. Finally, we have attempted to craft procedures for local authority review of basic service rates that allow local authorities sufficient time to make a meaningful decision and hence do not unduly strain their resources.

567. The Office of Advocacy agrees with the Commission's determination that cost-of-service rate regulation is a less desirable approach than establishing benchmark formulas for the basic service tier. However, it objects to the use of a single benchmark concerning both large and small systems. Office of Advocacy therefore favors an approach to basic service rates involving a series of benchmark formulas based on costs to similarly situated systems, and asks that a series of benchmark formulas be examined in this Final Regulatory Flexibility Analysis. Specifically, Office of Advocacy favors adoption of benchmark formulas relative to system characteristics, with adjustments for inflation based on either a general cost index; or a utility specific cost index. Similarly, Office of Advocacy favors a benchmark approach for non-basic cable service rates, and suggests that, in addition to the characteristics proposed in the Notice, program acquisition costs also be considered in

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[1433] The Office of Advocacy defines small cable system for purposes of its comments as "any system or systems with a total of less than 31,000 subscribers." Office of Advocacy Comments at fn. 14. Our definition of small system, however, is based on the 1992 Act's definition, a system serving 1,000 or fewer subscribers.

formulating benchmarks for both basic and non-basic services. Office of Advocacy suggests an alternative to a benchmark formula for non-basic services for certain small multiple system operators, which would examine the profit and loss of cable systems as a whole. Under this alternative, failure to find excessive profits under this proposal would be comparable to a finding that rates are not unreasonable. Office of Advocacy believes that this proposal would limit the paperwork burden facing smaller multiple operator systems who would have to calculate the benchmark for cable programming service for each individual system. Additionally, Office of Advocacy recommends that the Commission provide cable operators with the opportunity to show that the formula does not accurately reflect the costs of providing basic service.

568. Many of the issues raised by the Office of Advocacy are addressed by actions adopted in the Commission's decision. For example, once a benchmark has been established, increases in basic service rates regulated by local franchising authorities will be capped by a Commission-established price cap formula. Requested increases may not exceed the Gross National Product fixed weight price index, which reflects general increases in the cost of doing business and measures changes in overall inflation and external costs. This segment of the regulations corresponds with the Office of Advocacy's suggestion that a general cost index would more accurately reflect the changes in costs faced by cable systems. Additionally, cable operators will be allowed to increase rates exceeding the price cap if the increase is justified by a cost-of service showing. We will also permit adjustments for increases in programming costs that exceed inflation, and for retransmission consent fee increases after 1996.

569. While the Commission agrees with Office of Advocacy that it is important to consider the characteristics of individual systems in selecting benchmark formulas, we elect not to apply different cap structures to systems with different characteristics. We believe that the information compiled to date does not provide a sufficient basis for identifying characteristics (other than the number of subscribers, the number of channels and the number of satellite signals) that would warrant application of different cap structures. In addition, such an approach would add to the complexity and administrative cost of regulation. A benchmark approach based on selected industry characteristics, as well as on the number of subscribers, the number of channels, and the number of satellite signals, as opposed to the costs of individual systems, not only protects consumers from excessive rates and minimizes administrative and compliance costs, it provides an incentive for systems to be efficient by allowing low-costs systems to keep savings achieved through increased efficiencies. The industry benchmark is, however, based inter alia on the number of

subscribers a system serves. Thus, by tailoring rate regulations to the size of a system, this approach meets many of the concerns addressed by the Office of Advocacy.

570. Office of Advocacy next suggests a procedure for considering complaints about cable programming service rates. Office of Advocacy states that the complainant must notify the cable operator of the complaint simultaneously with the Commission, and must demonstrate that a violation of the rate benchmark exists. The cable operator would then show either that the formula was used incorrectly or that other reasons warrant the rate violation. On this basis the Commission would ascertain whether or not a violation exists and is unreasonable. Once that determination has been made, under the Office of Advocacy plan, if other complaints about the same operator are filed, they can be denied by invoking res judicata, absent evidence of a rate increase, because the new petitions would retrace "already trod ground." Or, alternatively, Office of Advocacy says that the Commission could require that any complainant show that the content of their petition has not been ruled on previously by the Commission. The Commission's plan for filing complaints is detailed in paragraphs 330-368. As recommended by Office of Advocacy, the cable operator must be notified of the complaint simultaneously with the Commission. Once the complaint form has been submitted, the Commission will determine whether it meets the minimum showing. If a complainant does make a minimum showing, the cable operator must respond and bears the responsibility for proving that the rate is not unreasonable. The Commission will consider the complaint or complaints and issue a written decision. We agree with Office of Advocacy that any complaint filed against the same operator after the rate is determined to be reasonable, can automatically be dismissed unless new evidence of a violation is provided.

571. Office of Advocacy recommends ways to reduce or eliminate reporting and recordkeeping burdens. It suggests that the Commission utilize recordkeeping and reporting requirements geared to the requirements of the benchmark formulas. Office of Advocacy believes that in this way small systems will be ensured of facing only those information collection requirements appropriate to the benchmark formula. The administrative burden placed on small systems by cable rate regulation is discussed at paragraph 462. The Commission recognizes that imposing an insurmountable paperwork or recordkeeping burden will ultimately have a particularly detrimental effect on the ability of small cable systems to respond to the programming and service needs of their subscribers. Thus, when we establish reporting requirements, we will consider whether to abbreviate them for small cable systems. To further relieve the administrative burden on small systems, the Commission will permit franchise authorities to exempt small systems from the requirement to file an initial rate schedule with the local franchise authority.

However, a small system proposing to increase its basic rates or answering a cable programming service complaint will need to follow any notice and other procedural requirements we establish.

572. Finally, the Office of Advocacy recommends that the Commission delay the effective date of the regulations until all petitions for reconsideration have been addressed. This delay according to Office of Advocacy, would allow time for the Commission, cable operators, and franchising authorities to "study, analyze, and recommend modifications without going through a futile rate regulation process." Office of Advocacy states that a delay would also allow small operators to adjust not only to a set of initial regulations, but to the ensuing modifications. This request should be made as part of a petition for stay when and if reconsideration petitions are filed and satisfy the Commission's requirements for an administrative stay. We deny the Office of Advocacy's request now as premature.

573. Significant alternatives considered and rejected: The Commission considered a number of options before selecting the program for implementing cable rate regulation which we believe offers the best balance of satisfying the requirements and goals of the Act with a minimum accompanying administrative burden on small businesses. In discussing the effect of the decisions made through this action, however, it is important to note that while the Commission has been provided with some flexibility in carrying out the mandate of the Act, the general parameters of how rates are to be controlled are set forth in the Act and in its legislative history. Within these constraints, we have adopted significant modifications to our proposed rate requirements which should ease the burden on small systems as contemplated under the statute. (See, for example Section II.A.(5)(f)). It is also important to note that the regulations adopted today are undoubtedly not the permanent cable rate regulations. In accordance with the statute, the Commission will review and monitor the effect on industry and consumers and refine and improve them as necessary.

574. Commenters representing cable interests and franchising authorities submitted many alternatives aimed at minimizing administrative burdens. The Commission considered such alternatives and tried to accommodate the concerns the suggested alternatives were intended to address. Many such alternatives were reviewed and rejected. Some of these alternatives are discussed above in the Commission's response to the Office of Advocacy's reply to the Initial Regulatory Flexibility Act Statement. For example, we contemplated whether to adopt a cost-of-service approach to rate regulation rather than the benchmark approach with cost-of-service as a secondary approach adopted. As detailed in paragraphs 181-188, the Commission believes that, while there are some advantages to cost-of-service regulation, there are also significant

disadvantages. Another example of alternatives contemplated, but not adopted concerned reduction of cable rates. The Commission in this instance, at paragraphs 1-15, chooses to interpret the Act as intending the regulations to serve not as a check on prospective cable rates, but also as an overall industry-wide rate only reduction. There were also a wide variety of options available in defining effective competition for purposes of rate regulation. These alternatives considered and dismissed are set out in 16-38. In paragraphs 192-197, the Commission determines that a parallel rate regulation scheme for both the basic service and non-basic service tiers would deter cable operators from moving services from the basic tier into non-basic to evade rate regulation. As a final example of an alternative which the Commission reviewed and rejected, we elect to solicit further comment on financial information collection requirements in a future Further Notice of Proposed Rule Making, and thus defer adoption of such a requirement until the comments received in reply have been submitted and reviewed.

B. Initial Regulatory Flexibility Act Analysis for the Further Notice of Proposed Rulemaking.

575. Pursuant to Section 603 of the Regulatory Flexibility Act, the Commission has prepared the following initial regulatory flexibility analysis (IRFA) of the expected impact of these proposed policies and rules on small entities. Written public comments are requested on the IRFA. These comments must be filed in accordance with the same filing deadlines as comments on the rest of the Further Notice, but they must have a separate and distinct heading designating them as responses to the regulatory flexibility analysis. The Secretary shall cause a copy of the Further Notice, including the initial regulatory flexibility analysis, to be sent to the Chief Counsel for Advocacy of the Small Business Administration in accordance with Section 603(a) of the Regulatory Flexibility Act, Pub. L. No. 96-354, 94 Stat. 1164, 5 U.S.C. Section 601 et seq. (1981).

576. Reason for action. The Cable Television Consumer Protection and Competition Act of 1992 requires the Commission to prescribe rules and regulations for determining reasonable rates for basic tier cable service and to establish criteria for identifying unreasonable rates for cable programming services. The Commission has adopted rate regulations that require a comparison to the rate of cable systems subject to effective competition, as defined in the Cable Act of 1992. This Further Notice proposes a comparison to rates of cable systems subject to effective competition, excluding those systems with less than 30 percent market penetration.

577. Objectives. To propose rules to implement Section 623 of the Cable Television Consumer Protection and Competition

Act of 1992. We also desire to adopt rules that will be easily interpreted and readily applicable and, whenever possible, minimize the regulatory burden on affected parties.

578. Legal Basis. Action as proposed for this rulemaking is contained in Sections 4(i), 4(j), 303(r) and 623 of the Communications Act of 1934, as amended.

579. Description, potential impact and number of small entities affected. Until we receive more data, we are unable to estimate the number of small cable systems that would be affected by any of the proposals discussed in the Further Notice of Proposed Rulemaking. We have, however, attempted to reduce the administrative burdens and cost of compliance for cable systems that have 1,000 or fewer subscribers as required by Section 623(i) of the Cable Act of 1992.

580. Reporting, record keeping and other compliance requirements. The proposals under consideration in this Further Notice of Proposed Rulemaking do not include the possibility of new reporting and record keeping requirements for cable systems.

581. Federal rules which overlap, duplicate or conflict with this rule. None.

582. Any significant alternatives minimizing impact on small entities and consistent with stated objectives. Wherever possible, the Further Notice proposes general rules, or alternative rules for small systems, to reduce the administrative burdens and cost of compliance for cable systems that have 1,000 or fewer subscribers as required by Section 3(i) of the Cable Act of 1992.

IV. Paperwork Reduction Act

583. The proposal contained herein has been analyzed with respect to the Paperwork Reduction Act of 1980 and found to impose a new or modified information collection requirement on the public. Implementation of any new or modified requirement will be subject to approval by the Office of Management and Budget as prescribed by the Act.

V. Procedural Provisions

584. For purposes of this non-restricted informal rulemaking proceeding, members of the public are advised that ex parte contacts are permitted from the time of issuance of a notice of proposed rulemaking until the time a draft Order proposing a substantive disposition of the proceeding is placed on the Commission's Open Meeting Agenda. In general, an ex parte presentation is any written or oral communication (other than formal written comments or pleadings and oral arguments) between

a person outside this addresses the merits of the proceeding. Any person who submits a written ex parte presentation addressing matters not fully covered in any written summary must be served on this Commission's Secretary for inclusion in the public file, with a copy to the Commission official receiving the oral presentation. Each ex parte presentation discussed above must state on its face that the Secretary has been served, and must also state by docket number the proceeding to which it relates. See generally Section 1.1231 of the Commission's Rules. 47 C.F.R. §1.1231.

585. Pursuant to applicable procedures set forth in Sections 1.415 and 1.419 of the Commission's Rules, 47 C.F.R. Sections 1.415 and 1.419, interested parties may file comments on or before June 17, 1993, and reply comments on or before July 2, 1993, To file formally in this proceeding, you must file an original plus four copies of all comments, reply comments, and supporting comments. If you want each Commissioner to receive a personal copy of your comments and reply comments, you must file an original plus nine copies. You should send comments and reply comments to Office of the Secretary, Federal Communications Commission, 1919 M Street, N.W. Washington, D.C. 20554. Comments and reply comments will be available for public inspection during regular business hours in the FCC Reference Center, Room 239, Federal Communications Commission, 1919 M Street N.W., Washington D.C. 20554.

VI. Ordering Clauses

586. Accordingly, IT IS ORDERED that, pursuant to Sections 4(i), 4(j), 303(r), 612(c) and 623 of the Communications Act of 1934, 47 U.S.C. §§ 154 (i), 154 (j), 3030(r), 532 (c), 542(c), 543, NOTICE IS HEREBY GIVEN of proposed amendments to Part 76, in accordance with the proposals, discussions, and statement of issues in this Notice of Proposed Rulemaking, and that COMMENT IS SOUGHT regarding such proposals, discussion, and statement of issues.

587. Accordingly, IT IS ORDERED that, pursuant to Sections 4(i), 4(j), 303 (r), 612, 622(c) and 623 of the Communications Act of 1934, as amended, 47 U.S.C. §§ 154(i), 154(j), 303(r), 532, 542(c) and 543, the REPORT AND ORDER IS ADOPTED amending Part 76 of the Commission's rules 47 C.F.R. Part 76, as indicated above and in Appendix C.

588. IT IS FURTHER ORDERED that, the Secretary shall send a copy of this Report and Order, including the certification, to the Chief Counsel for Advocacy of the Small Business Administration in accordance with paragraph 603(a) of the Regulatory Flexibility Act. Pub. L. No. 96-354, 94 Stat. 1164, 5 U.S.C. §§ 601 et seq. (1981).

589. IT IS FURTHER ORDERED that the requirements and regulations established in this Report and Order shall become effective on June 21, 1993.

FEDERAL COMMUNICATIONS COMMISSION

Donna R. Searcy
Secretary

APPENDIX A -- EXECUTIVE SUMMARY

APPENDIX A

Cable Rate Regulation Executive Summary

I. Introduction

1. This Report and Order and Further Notice of Proposed Rulemaking amends the Commission's rules to implement Sections 623 (subscriber rate regulation), 612 (commercial leased access), and 622(c)(subscriber bill itemization), of the Communications Act of 1934, as amended by the Cable Television Consumer Protection and Competition Act of 1992 ("Cable Act of 1992 or "1992 Cable Act").[1] The Report and Order reflects, in large part, the Commission's efforts to ensure that cable subscribers nationwide enjoy the rates that would be charged by cable systems operating in a competitive environment. The Further Notice examines whether the Commission should refine its initial analysis by excluding the rates of cable systems with less than 30 percent penetration from its analysis of systems facing effective competition, even though such systems are defined as systems that face effective competition under the 1992 Cable Act.

2. The Cable Act of 1992 generally provides that where competition is present, cable television rates shall not be subject to regulation by government but shall be regulated by the market. The Act contains a clear and explicit preference for competitive resolution of issues where that is feasible. However, where competition is absent, cable rates are to be regulated to protect the interests of subscribers. This regulation is to be undertaken jointly by the Federal Communications Commission and by state and local governments. Local (or state) governments are primarily responsible for the regulation of rates for programming service and equipment on the basic service tier, and this Commission will entertain complaints against the rates for programming services and equipment for the cable programming services tier or tiers. (Services offered on a per-channel or per-program basis are not subject to rate regulation).

3. The primary results of this proceeding are: 1) development of a process for identifying those situations where effective competition exists (and rate regulation is thus

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[1] Cable Television Consumer Protection and Competition Act, Pub. L. No. 102-385, §§ 3, 9, 14, 106 Stat. 1460 (1992) ("Cable Act of 1992"). The Cable Act of 1992 became law on October 5, 1992. This proceeding was commenced through the issuance of our Notice of Proposed Rule Making in Docket 92-266, 8 FCC Rcd 510 (1992) ("Notice"). The Commission is required to prescribe regulations to carry out its obligations under the rate regulation provisions of the Act within 180 days of the law's enactment.

precluded), 2) establishment of the boundaries between local and state, and federal responsibilities, 3) development of procedural and substantive rules to govern the regulation of basic service tier, cable programming service, and leased channel rates, and 4) creation of a process of gathering information to facilitate the regulation that is being undertaken and periodically review its effectiveness.

4. In the Report and Order, the Commission seeks a comprehensive approach to cable rate regulation that achieves a reasonable balancing of statutory requirements and that will promote the broad policy objectives reflected in the statute. As required by the 1992 Cable Act, it provides for regulation of cable rates by local franchising authorities and the Commission pursuant to jurisdictional and procedural requirements that have been designed to reduce burdens on cable operators, local authorities, the Commission, and consumers. In addition, the requirements that will govern permitted rate levels for cable service and reflect a balancing of the interests of consumers and of cable operators. In this regard, the initial rate regulations should produce substantial savings to consumers on an aggregate industry basis. These savings will result from rate reductions required from a broad segment of regulated cable operators that service most of the nation's cable subscribers. The required rate reductions should not hinder the ability of the cable industry to continue to provide quality services to consumers. On a going forward basis, price caps for regulated cable systems will reduce administrative burdens and permit the continued growth of services while effectively governing future rate levels.

5. The regulations adopted today may well change over time. In accordance with the statute, the Commission will review and monitor the effect of our initial rate regulations on the cable industry and consumers, and refine and improve our rules as necessary. In addition, it will issue separately a Second Further Notice to obtain a better record for adoption of cost-of-service showings by cable operators seeking to raise rates above capped levels. This step is necessary to assure that the regulations governing such showings will correctly balance the interests of consumers in paying a fair rate and of cable operators in earning a reasonable profit.

II. Report and Order

A. Rate Regulation of Cable Service

1. Rollback of Cable Service Rates

6. The Report and Order finds that Congress was concerned that rates of systems not subject to effective competition reflect undue market power and are unreasonable to the extent they exceed competitive rate levels. This conclusion is

based upon the findings and goals of the Cable Act of 1992, the overall scheme of regulation under it, and the fact that the Commission must consider the rates of systems subject to effective competition in establishing rate regulations. Additionally, the Commission conducted a survey of cable system rates as of September 30, 1992, which revealed that, on average, rates of systems not subject to effective competition are approximately 10 percent higher than rates of comparable systems subject to effective competition, as that term is defined in the statute. Thus, the Commission's survey supports the findings of Congress that current rates for cable systems not subject to effective competition reflect pervasive market power.

7. The Commission concludes, therefore, that its initial effort to regulate rates for cable service should provide for reductions from current rates of cable systems exhibiting undue market power. The Commission's initial implementation of rate regulation of cable service will generally lead to significant reductions from current rate levels for most cable systems. Our approach will enable local franchise authorities to require rates for the basic tier, and the Commission to require rates for cable programming services on the basis of individual complaints, to fall approximately 10 percent, unless the operator is already charging rates that are at the "competitive" benchmark level or it can justify a higher rate from September 30, 1992 levels, based on costs. The Commission estimates that this rollback will affect approximately three-quarters of cable systems, with a total consumer benefit of approximately $1 billion. Rates of all regulated systems will then be subject to a price cap that will govern the extent to which rates can be raised in the future without a cost-of-service showing. We will also examine systems with rates substantially above the benchmark and will seek to refine the benchmark through further industry surveys.

2. Standards and Procedures for Identifying Cable Systems Not Subject to Effective Competition

a. Application of Effective Competition Tests

8. Cable service and equipment rates may only be regulated under the Cable Consumer Protection and Competition Act of 1992 ("1992 Act") if the cable system is not subject to effective competition. Under the statute, "effective competition" exists if: **(a)** fewer than 30 percent of households in the franchise area subscribe to the cable service of a cable system; **(b)** (i) the franchise area is served by at least two unaffiliated multichannel video programming distributors ("multichannel distributors"), each of which offers comparable programming to at least 50 percent of households in the franchise area, and (ii) the number of households subscribing to programming services offered by multichannel distributors other than the largest multichannel distributor exceeds 15 percent of households in the franchise area; or **(c)** the

franchise authority itself is a multichannel distributor and offers video programming to at least 50 percent of the households in the franchise area.

(1) Multichannel Video Programming Distributor

9. When applying the above definition, multichannel distributors will include cable systems, MMDS operators, SMATV systems, DBS operators, TVRO distributors and video dialtone service providers. We here determine that programmers using leased access channels on cable systems will not be considered multichannel distributors.

(2) Availability of Competing Services

10. A multichannel distributor's service is "offered" in a franchise area if the service is both technically and actually available, with no regulatory, technical or other impediments to households taking service. Service will be deemed to be "technically available" when the multichannel distributor is physically able to deliver the service to a household wishing to subscribe, with only minimal additional investment by the distributor. A service will be considered "actually available" if subscribers in the franchise area are reasonably aware through marketing efforts that the service is available.

(3) Definition of Household

11. We define the term "household" as each separately billed or billable customer, except that we treat individual residences of multiple dwelling units as separate households.

(4) Measurement of Subscribership

12. For purposes of applying the 30 percent threshold in the first effective competition test, the measurement of subscribership will be based on that of the particular system in question, and not an aggregation of all cable systems or competitors in the franchise area. For purposes of applying the 15 percent threshold in the second effective competition test, subscribership of alternative multichannel distributors will be calculated on a cumulative basis; however, only those multichannel distributors that offer programming to at least 50 percent of the households in the franchise area will be included in the 15 percent cumulative measurement.

(5) Program Comparability

13. A multichannel distributor will be deemed to offer "comparable programming" to that provided by a cable system if it offers at least twelve channels of video programming, including at least one nonbroadcast channel.

b. Finding of Effective Competition:

14. For purposes of implementing rate regulation by local franchising authorities, we presume that cable operators are not subject to effective competition. Franchising authorities may rely on this presumption when filing a certification with the Commission to regulate basic rates. The cable operator will then have the burden of rebutting this presumption with evidence demonstrating that effective competition does in fact exist.

15. To ensure that cable operators have access to the data they need to mount a successful challenge to the presumption against effective competition, alternative multichannel distributors will be required to respond, within 15 days, to requests from cable operators for relevant information. Responses by the alternative distributors may be limited to the numerical totals needed to calculate the distributor's reach and penetration in the franchise area.

3. Regulation of the Basic Service Tier

a. Assertion of Jurisdiction over Basic Service and Equipment Rates

(1) Jurisdiction Over Basic Rate Regulation

16. The 1992 Cable Act requires local authorities wishing to regulate basic service and equipment rates to certify in writing to the Commission that (1) its rate regulations will be consistent with the rate regulations we prescribe; (2) it has the legal authority to adopt, and the personnel to administer, rate regulations; and (3) its procedural rules provide an opportunity for consideration of the views of interested parties. Such certification filed with the Commission by a franchising authority will become effective 30 days after filing unless the Commission finds, after notice and a reasonable opportunity to comment, that the franchising authority has not met one of the three criteria above. If the Commission disapproves the certification, the franchising authority will be notified of any revisions or modifications necessary to gain approval. If the Commission disapproves or revokes a certification, we will exercise the franchise authority's regulatory jurisdiction until the authority becomes qualified by filing a new certification that meets the requirements set forth above. Such new certifications become effective upon approval by the Commission, which approval (or disapproval) will be issued within 90 days of filing.

(a) Division of Jurisdiction Between FCC and Local Governments

17. Under the statute, local franchising authorities and the Commission have shared jurisdiction over the regulation of basic service and equipment rates. However, the Commission will not exercise jurisdiction unless either (a) a local franchising authority's certification is denied or revoked, or (b) the franchising authority requests us to regulate basic rates because it has insufficient resources to regulate or it lacks the legal authority to do so. Franchising authorities requesting Commission intervention on the basis of insufficient funds must submit a showing explaining why the franchise fees it obtains cannot be used to cover the cost of rate regulation at the local level. The Commission will not regulate basic rates where a local government voluntarily chooses not to seek certification because it is satisfied with the rates charged by the local cable operator.

(b) Preemption Issues

AA. Preemption of Franchise Agreements

18. All provisions in franchising agreements that prohibit rate regulation by franchise authorities are preempted by the 1992 Cable Act. Regardless of any provision in the franchise agreement, then, a franchising authority may regulate rates for basic service and equipment if the authority meets the certification standards.

BB. Preemption of State Law

19. State laws that preclude rate regulation are not preempted, although in such cases the Commission will assume jurisdiction over basic service and equipment rates. Similarly, state laws that prohibit local governments, but not state governments, from engaging in rate regulation are not preempted; in these cases, basic rate regulation will be conducted at the state level.

(2) The Certification Process

(a) The Certification Form

20. Franchising authorities intending to regulate basic rates must first submit a form certification with the Commission. This form, which will be available from the FCC, will certify that the franchising authority has met the statutory requirements (set forth above) for seeking certification and will further certify that, to the best of the franchising authority's knowledge, effective competition does not exist in the franchise area.

(b) Joint Certification

21. We decide that joint certification for communities served by the same cable system is permitted but not required.

Joint certification for communities served by different systems is also permitted. A state may not file a blanket certification on behalf of its franchising authorities. However, if a state (e.g. a statewide public utilities commission) is the franchising authority, it is entitled to file the certification for itself.

(c) Approval of Certification by the Commission

22. Franchising authorities may begin filing certifications with the Commission 30 days after publication of the Report and Order in the Federal Register, although there is no deadline by which a franchising authority must seek certification. Under the statute, a certification will go into effect in 30 days unless the Commission finds that it is defective. The franchising authority must either mail the form by registered mail, return receipt requested, or hand-deliver the form and obtain a date-stamped copy. The 30-day period will run from the date stamped on the return receipt or copy. However, franchising authorities will not be able to begin regulating rates until they have adopted regulations consistent with those adopted by the Commission in the Report and Order and have implemented rules which give interested parties a reasonable opportunity to comment during the rate regulation process. Franchising authorities have 120 days from the effective date of certification to adopt these rules and regulations.

23. Cable operators may file a petition for reconsideration challenging the franchising authority's certification. Such petitions may be filed any time within the 30-day period after a certification has become effective. An operator filing a petition for reconsideration on the ground that it is subject to effective competition will be granted an automatic stay of rate regulation until resolution of the petition, subject to refund liability back to the date the petition was filed if the Commission subsequently determines that there is no effective competition. Cable operators that file frivolous effective competition petitions to take advantage of the automatic stay provision will be subject to forfeitures.

24. If an operator believes that a franchise authority cannot be certified due to other defects (e.g., it does not have the legal authority, it lacks adequate resources or its rate regulations are not consistent with ours), the operator may file either a petition for reconsideration (which would be filed within 30 days after the certification becomes effective) or a petition for revocation (which could be filed at any time). Operators filing such petitions will not be entitled to an automatic stay of regulation but may request a stay.

25. Where we deny a certification on other than effective competition grounds, the franchising authority will be notified and informed of any modifications that must be made in

order to obtain Commission approval. If, after this opportunity to cure, the authority still fails to meet the certification requirements, its certification will be revoked.

(d) Revocation of Certification

26. We will revoke a franchising authority's certification if, after a reasonable opportunity to comment, it is determined that state and local laws and regulations do not conform to the Commission's rate regulations governing cable rates. A franchising authority's certification may be revoked if, after remand, a franchising authority fails to fulfill one of the three conditions for certification set forth above. In cases of revocation, the Commission will assume jurisdiction over basic service rates until an authority becomes recertified. In those cases remanded back to the franchising authority, an opportunity will be provided to cure defects with directions on how this may be accomplished. Resubmissions will be considered on an expedited basis. A franchising authority's certification will be revoked in these cases only if the authority fails to implement the remand order. While a petition for revocation is pending however, and absent grant of a stay, the franchising authority may continue to regulate the basic service rates of its franchisees.

27. A cable operator once not subject to effective competition that later becomes subject to effective competition, may petition the franchising authority for change in its regulatory status. The operator bears the burden of proving the existence of effective competition. After an initial determination of the franchising authority that effective competition exists becomes final, the franchising authority will then cease regulating basic cable service rates, and the Commission's regulatory authority over cable programming services for the system in the franchise area will also cease. Cable operators denied a change in status by a franchising authority may seek review of that finding at the Commission by filing a petition for revocation. A joint statement may also be submitted by the cable operator and a franchising authority stating that effective competition exists. The joint statement must state which of the three statutory tests for effective competition has been met and explain how the test has been satisfied.

(e) Assumption of Jurisdiction

28. If the Commission denies or revokes a franchising authority's certification, it will exercise the franchising authority's jurisdiction over basic rate regulation until the authority requalifies. Upon denial of or revocation of certification, the Commission will assume jurisdiction and notify the local franchising authority and the cable operator. The notification to the cable operator will require it to file its basic rate schedule with the Commission within 30 days, with a copy

to the local franchising authority. Basic rate filings for existing rates or proposed rate increases for services and equipment (including increases in the baseline channel charge that results in the number of channels in a tier) must be accompanied by the appropriate FCC forms. Cable operators with existing or proposed rates above the permitted tier rate must submit a cost-of-service showing sufficient to support a finding that the rates are reasonable. Until further notice, cost-of-service showings should be made pursuant to the interim standards set forth in this document.

29. The Commission will assume basic rate jurisdiction until the franchising authority files a "petition for recertification" that is subsequently approved. The petition should contain a clear showing, supported by either objectively verifiable data such as a state statute, or affidavit, that the underlying reasons for revocation or denial no longer pertain, and must attach a copy of the earlier decision denying or revoking the original certification.

b. Implementation and Enforcement of Basic Tier Rates

(1) Review by Local Franchising Authorities

(a) Initiation of Basic Cable Rate Review

30. Once a franchising authority has been certified and has adopted the appropriate rules, it must notify the cable operator that these requirements have been met and that it intends to regulate basic service rates. The cable operator will then have 30 days to file its basic rate schedule (and any supporting material concerning the reasonableness of its rates) with the franchising authority.

(b) Franchising Authority Review of Basic Cable Rates

31. A two-step approach will be used regarding franchise authority review of a cable operator's current rates for the basic service tier and accompanying equipment, or proposed increases in those rates. Under the first step, if a franchising authority is able to determine that a cable operator's current rates are within the Commission's reasonable rate standards, the rates could go into effect 30 days after they were submitted. Also, if the franchising authority found that a proposed rate increase was within the Commission's rate standards, the increase could go into effect 30 days after filing with the franchising authority.

32. Under the second step, if the franchising authority is unable to determine whether the rate in issue is within the Commission's reasonable rate standard, based on the material before it, or if the cable operator has submitted a cost-of-service

showing seeking to justify a rate above the Commission's reasonable rate level, the franchising authority may take an additional period of time to make a final determination and toll the effective date of the proposed rates for a commensurate period. A franchising authority may take an additional 90 days if it needs more time to ensure that a rate is within the Commission's rate standard. The authority may take an additional 150 days to evaluate a cost-of-service showing seeking to justify a rate above the reasonable rate level. The authority must issue a brief written decision regarding its invocation of the additional time period. If no action is taken within these time periods, the proposed rates will go into effect, subject to subsequent refund orders if a franchising authority later issues a decision disapproving any portion of the proposed rates.

(c) Due Process Concerns

33. A cable operator is required to notify subscribers in writing of a proposed rate increase at approximately the same time it notifies the franchising authority, i.e., at least 30 days before any proposed increase is effective. An operator, however, will not be required to publish a notice of a proposed rate increase in newspapers or provide information to subscribers regarding how to lodge a complaint. Operators will be required to include in their subscriber notifications the name and address of the local franchising authority, so that the requisite information on complaint procedures can be readily obtained by a subscriber.

34. A franchising authority is required to issue a written decision to the public whenever it disapproves either an initial basic cable rate or a request for an increase in whole or in part, or approves a proposed rate over the objections of interested parties. However, we will not require an authority to issue a written decision if it is approving a basic cable rate or rate increase in its entirety and there have been no objections.

(d) Proprietary Information

35. Franchising authorities have the right to collect information, including proprietary information, in order to make a rate determination in those cases where operators have submitted initial rates or have proposed increases that exceed the Commission's reasonable rate standard. In cases where initial or proposed rates comply with the Commission's rate standard, however, requests for additional information should relate to proper documentation that an operator's prices are in accord with that standard.

(2) Remedies and Appeals

(a) Remedies for Unreasonable Basic Cable Rates

36. Franchising authorities may order prospective rate reductions and, where they have determined that existing or proposed rates are unreasonable, prescribe a reasonable rate.

37. Franchising authorities may also invoke the remedy of ordering refunds in three situations: First, if an operator fails to comply with a rate decision and continues to charge unreasonable rates, the authority can order refunds back to the effective date of its rate order. Second, as part of its initial review of existing cable rates, an authority has the discretion to order refunds for unreasonable rates that exceed the Commission's permitted tier charge and are not supported by a persuasive cost-of-service showing by the operator. Third, if an authority has tolled a proposed rate increase for 90 or 150 additional days and has not completed its review by the end of these time periods, the proposed rates can go into effect subject to a refund if portions of the rates are later found to be unreasonable. For situations two and three above, the refund period is limited to a maximum of one year.

(b) Forum for Appeals of Local Authorities' Decisions

38. The Commission will exercise exclusive jurisdiction over appeals of local rate decisions involving whether the franchising authority has acted inconsistently with the rate regulation provisions of the Cable Act or our implementing rules.

(3) Notification of Availability of the Basic Service Tier

39. Cable operators are required to notify subscribers of the availability of basic tier service within 90 days or three billing cycles from the effective date of the rules adopted in this proceeding and are required to notify new subscribers at the time of installation. Operators who can demonstrate that they have satisfied the notification requirement in the twelve months prior to the effective date of the cable regulations will be exempt from this requirement, provided that their notice conforms to the format and content requirements of our rules.

c. Regulation of Basic Service Tier Rates and Equipment

(1) Components of the Basic Service Tier Subject to Rate Regulation

(a) Introduction and (b) General Requirements

40. The 1992 Cable Act requires cable operators to offer subscribers a separately available basic service tier to which subscription is required for access to any other tier of service. The basic tier must include, at a minimum, all must-carry signals, all PEG channels, and all domestic television signals other than superstations. The cable operator may add other channels of programming to its basic tier at its discretion. The statutory definition preempts provisions in franchise agreements that require additional services to be carried on the basic tier.

(c) Buying-Through Basic Service to Other Tiers

41. Subscribers must purchase the basic service tier in order to gain access to video programming offered on a per-program or per-channel basis. The Report and Order finds that purchase of the basic tier is not required in order to buy non-video programming services such as cable radio.

(d) A Single Basic Tier

42. Cable operators subject to rate regulation may have only one "basic" tier which must be unbundled from all other tiers; multiple basic tiers will not be permitted for rate regulation purposes.

(2) Regulations Governing Rates of the Basic Service Tier

(a) Statutory Standards

43. The Cable Act of 1992 requires the Commission to establish regulations that will assure reasonable rates for the basic service tier, but does not explicitly define "reasonable." Instead, it requires that regulations be designed to achieve statutory goals and take into account the enumerated statutory factors. We conclude that the statute does not require the Commission to place primary weight on any of the statutory factors governing rates for the basic service tier, but that we may do so as part of a reasoned balancing of statutory requirements and factors. Based on statutory findings and goals, as well as results from the Commission's industry survey, we have determined that under the statute the Commission can, and should, place primary weight on the rates of systems subject to effective competition. Accordingly, the Commission's regulations governing rates for the basic service tier are aimed toward achieving rate levels that are closer to rates of systems subject to effective competition.

(b) Benchmarking versus Cost-of-Service Regulation

44. The Commission examines the relative merits of a benchmarking versus a cost-of-service approach as the primary method for regulating rates for the basic service tier. We conclude that we should incorporate a benchmark into our framework for regulation of basic service tier rates because a benchmark can protect consumers from excessive rates and keep the costs of administration and compliance low. The Commission's rules, however, allow cable operators to use cost-of-service principles to justify rates higher than permitted by the system's benchmark.

(c) Local Authority Discretion

45. The Report and Order concludes that local authorities may not elect cost-of-service regulation as their primary mode of regulation of the basic service tier because such an approach would establish a regulatory regime for the basic service tier that is less consistent with Congressional intent than benchmark regulation. Rather, local governments must apply the benchmark system of rate regulation adopted by the Commission, unless a cable operator chooses to make a cost-of-service showing.

(d) Basic Rate Level in Comparison to Other Tiers

46. The Commission declines to adopt a regulatory framework for cable service that seeks lower rates for the basic service tier in comparison to higher tiers. We believe that any advantages in producing a low priced basic tier are outweighed by the incentives for cable operators to reduce offerings on the basic service tier. Accordingly, the Commission establishes a tier neutral framework for rate regulation that applies the same standards of reasonableness to the basic service tier and to cable programming services.

(e) Adoption of a Benchmark to Govern Rates for the Basic Service Tier

AA. The Competitive Benchmark

47. The Report and Order discusses the various benchmark alternatives proposed in the Notice. We find that the Cable Act of 1992 reflects a congressional conclusion that current rates for cable service result, in part, from an ability to raise rates to unreasonable levels because of a lack of effective competition, and that rates are unreasonable to the extent they exceed competitive levels. Our industry survey confirms that rates of systems not subject to effective competition exceed competitive levels by approximately 10 percent on an average industry basis. Based on the statute and the results of the Commission's industry survey, we conclude that the reasonableness of rates of the basic service tier shall be determined by reference to the rates of systems

subject to effective competition. The Commission, therefore, adopts a table of benchmarks based on the average September 30, 1992 rates of systems subject to effective competition.

BB. System Characteristics

48. The Commission applies different benchmark rates to systems based on the individual system's number of channels, subscribers, and satellite signals, but our industry survey does not provide a sufficient basis for identifying other system characteristics that would warrant application of different rate structures. As the Commission gains more experience with cable rate regulation, it may reevaluate this conclusion.

CC. Application of the Benchmark to Determine Initial Regulated Rate Levels

49. The Commission concludes that it will consider reasonable a per channel rate for the basic service tier that is at, or below, the benchmark level when a system becomes subject to regulation. Where a cable system is not charging rates that are above the competitive benchmark we can assume that its rates do not reflect undue market power, even in the absence of effective competition. Therefore, the initial regulated rate for such a system shall be its rate in effect on the date the system becomes subject to regulation, regardless of the amount that rate is below the benchmark.

50. Rates exceeding the applicable benchmark at the time regulation begins are presumptively unreasonable because they exceed the average rate charged by systems subject to effective competition. Some systems with rates at the onset of regulation that are above the benchmark may have had rates that were below the benchmark on September 30, 1992. Such systems are not subject to a rollback from levels in effect on September 30 because the rates were presumptively reasonable on that date. These systems must reduce rates from existing levels to the benchmark, but they may maintain increases from September 30, 1992 levels up to the benchmark and adjust rates to reflect inflation.

51. For a system with basic tier rates above the benchmark both when it becomes subject to regulation and on September 30, 1992, the maximum permitted rate will be the September 30, 1992 rates reduced 10 percent, but no lower than the benchmark rate for that system.

52. Instead of requiring all systems to now reduce rates to benchmark levels, the Commission will take the following steps to address systems with September 30, 1992 rates more than 10 percent above the benchmark: 1) conduct further surveys to refine the competitive benchmark, and further assess the competitive rate

differential between systems subject, and not subject, to effective competition, and to gather cost information; 2) examine in the Further Notice whether the Commission can, or should, exclude from competitive benchmark calculations, systems with less than 30 percent penetration; and 3) carefully scrutinize rates of cable systems that exceed the benchmark by significant amounts even after the 10 percent rollback through cost investigations.

53. The foregoing determinations define the initial permitted rate for the basic service tier when the system becomes subject to regulation. Those systems with initial rates based on adjusted September 30, 1992 rates, may further adjust those rates to reflect inflation occurring between September 30, 1992 and the time when regulation of the basic service tier begins. They must also apply an efficiency adjustment, specified in the rules, to those rates if the total number of subscribers or channels on the system changes between September 30, 1992 and the time of regulation. After those adjustments are made, the initial permitted rate for the basic service tier will then be capped as described in the next section.

(f) Adoption of the Price Cap

AA. In General

54. The Commission adopts a price cap mechanism to assure that future rate increases remain within reasonable bounds. We have found that a price cap approach is an effective alternative to cost-of-service regulation in other regulated areas, and that this approach is consistent with our statutory mandate. At the same time, the Commission has provided for adjustments to the price cap, based on inflation and other factors beyond an operator's control, to assure that the cap does not unduly restrict cable operators' ability to recover costs. The possibility of a cost-of-service showing will also assure that cable operators can recover appropriate costs of service. The price cap rate for the basic service tier will be expressed as a rate per channel to facilitate rate calculations and review.

BB. Application of the Cap to Systems with Current Rates Below the Benchmark

55. The price cap applies to all regulated systems, including those systems with rates that are below the benchmark on the date that regulation commences, unless a cable system justifies higher rates based on cost-of-service principles.

CC. Annual Adjustment Index

56. The Commission establishes an annual adjustment index that permits changes in each system's cap for the basic

service tier based on general changes in the cost of doing business. We adopt the GNP fixed weight price index (GNP-PI) as the annual adjustment index for the cap for basic service tier rates. Under our rules, cable operators may adjust the capped base per channel rate for the basic service tier annually after the final GNP-PI is published by the Department of Commerce for the preceding year. This approach represents the best balance between the administrative burdens imposed by more frequent rate adjustments and the need to permit prompt adjustments for inflation.

(g) External Costs

AA. Retransmission Consent Fees

57. The Commission concludes that retransmission consent costs should be treated as external to the benchmark. However, we are concerned that external treatment during the initial period in which cable operators and broadcasters will establish retransmission consent agreements, may unduly skew incentives away from fair bargaining for reasonable retransmission fees. The Commission believes that a delay in onset of external treatment for retransmission consent fees will serve to protect subscribers from any precipitous increase in rates after October 6, 1993. Hence, we will accord retransmission consent costs external treatment only after October 6, 1994 and only for new or additional fees beyond those already in effect on October 6, 1994. The Commission will also monitor initial retransmission consent agreements and their potential impact on subscribers and may reexamine external treatment if it appears that retransmission consent fees have an unwarranted impact on subscribers.

BB. Other External Costs

58. Programming Costs Other Than Retransmission Consent. The Commission will treat programming cost increases, other than retransmission consent, as external to the benchmark. We will monitor the impact of external treatment of programming cost increases and consider making programming costs subject to the cap if it appears that this treatment is disserving subscribers. The Commission's accounting and cost allocation requirements will determine the share of programming costs to be allocated to the basic service tier. The Report and Order also limits external treatment of programming costs for programming obtained from affiliated entities to the percentage change in the admissions component of the Consumer Price Index between the effective date of the price increase and the date the previous price took effect.

59. Taxes, Franchise Fees, Cost of Franchise Requirements. The Commission also excludes from the cap taxes, franchise fees and the costs of satisfying franchise requirements, including the costs of satisfying franchise requirements for local,

public, educational and governmental (PEG) access channels. The Commission's accounting and cost allocation requirements provide that costs associated with PEG channels carried on the basic tier will be directly assigned to the basic tier where possible and remaining costs will be allocated between tiers in proportion to the number of channels on each tier.

CC. Starting Date for External Treatment

60. For all categories of external costs other than franchise fees, changes in external costs shall be measured from date on which the system becomes subject to regulation, or 180 days from the effective date of our regulations (December 20, 1993), whichever occurs first. Thus, any changes in external costs occurring prior to that date, including from September 30, 1992, will not be accorded external treatment.

61. The industry competitive rate level derived from the Commission's survey data has been adjusted to remove franchise fees. Thus, the Commission permits the total amount of franchise fees to be accorded external treatment at the time the system becomes subject to regulation, rather than only the amount of additional franchise fees incurred after that date.

DD. Limitation on External Treatment for Increases Less Than Inflation

62. For all categories of external costs, other than franchise fees, the Commission permits external treatment for increases in such costs only to the extent that they exceed inflation as measured by the GNP-PI. This requirement does not apply to franchise fees, however, because the benchmark and the Commission prescribed formula for determining the permitted channel rate, are adjusted to exclude franchise fees. Thus, the total amount of increases in franchise fees will be accorded external treatment. Similarly, since the benchmark does not reflect retransmission consent fees, we will accord external treatment to the total amount of retransmission consent fees, after October 4, 1994.

(h) Cost-of-Service Showings

AA. The Opportunity to Justify Rates Above the Cap Based On Costs

63. The Commission has determined that its primary method of regulating cable service rates shall be a price cap mechanism applied to rates determined in relation to the competitive benchmark. However, the starting price cap level is based on industry-wide data and does not necessarily reflect individual systems' costs of providing cable service. Thus, the Commission cannot be certain that the initial capped rate will

permit all cable operators to fully recover the costs of providing basic tier service and to continue to attract capital. Accordingly, a cable operator is permitted to make a cost-of-service showing to determine the reasonable rate for its system. The resulting rate determination will supercede our benchmark/rollback provisions. Thus, an operator may exceed the benchmark or capped rate if it can make the necessary cost showings in certain circumstances. Similarly, however, a cost-of-service determination resulting in a rate below that system's September 30, 1992 rate minus 10 percent will prescribe that system's new rate. The Commission rejects the alternative of not permitting cable operators to exceed the cap unless the rate as applied to them is confiscatory.

BB. Cost-of-Service Standards

64. The Report and Order adopts cost-of-service standards to govern the extent to which cable operators may exceed capped rates for the basic service tier based on costs. In the future, it may be appropriate for local franchising authorities to assume a larger role in setting cost-of-service standards for the basic tier, but the Commission believes that presently these standards should be established at the national level. However, the current record does not contain sufficient information for the Commission to adopt final cost-of-service standards for cable service at this time. Accordingly, a Second Further Notice of Proposed Rulemaking will be issued shortly to seek additional comment on the development of appropriate standards.

65. Pending this rulemaking, which the Commission intends to complete on an expedited basis, cable operators may elect to maintain current above benchmark rates and attempt to justify them in their initial rate filings pursuant to the general principles for cost-of-service regulation. Alternatively, operators may elect to reduce these rates as required by our benchmark regulations. Cable operators that reduce rates in accordance with Commission requirements may seek to raise rates above the cap pursuant to the general procedures the Commission is establishing for cable operators seeking rate increases for the basic service tier. Local authorities (or the Commission in situations where it regulates basic rates) will review cost-of-service showings by cable operators seeking to raise rates above capped levels. Cable operators or subscribers may then appeal the local decision to the Commission. The Commission will review such local decisions on a case-by-case basis pending the cost-of-service rulemaking.

(3) Regulations Governing Rates for Equipment

(a) Equipment Covered

66. The Cable Act of 1992 requires the Commission to establish standards for setting, on the basis of actual cost, the rate for installation and lease of equipment used by subscribers to receive the basic service tier, and the installation and lease of monthly connections for additional television receivers.

67. The Commission concludes that equipment "used to receive the basic service tier" is broadly interpreted and includes converter boxes, remote controls, connections for additional television sets and cable home wiring. Our expansive reading of the phrase "used to receive the basic service tier" means that equipment and installations used to receive both basic tier service and other services would be regulated according to actual cost guidelines described below. Although the Commission believes that Congress intended the Commission's regulations to encourage a competitive market in the provision of equipment and service installation, the Commission does not have, at this time, the information it would need to establish a separate effective competition test for installation and equipment. The Commission has begun a proceeding to investigate these issues. Therefore, all systems subject to rate regulation must comply with the actual cost standards for equipment and service installations used to receive the basic service tier.

(b) Unbundling

68. Cable systems must unbundle charges for equipment, installation, and additional outlets from the rates for basic service. In addition an operator must calculate separate charges for installations, remote control units, converter boxes, and other customer equipment.

(c) Actual Cost Standard

69. Local franchising authorities regulating equipment used to receive the basic service tier shall require cable operators to establish an Equipment Basket to which the operator will assign the direct costs of service installation, leasing, maintaining and servicing customer equipment. The Basket will include an allocation of all system joint and common costs that installation, leasing and repairing equipment share with other system activities, excluding general system overhead. The Equipment Basket costs include a reasonable profit. An operator must also calculate an Hourly Service Charge ("HSC") through which it would recover all Equipment Basket costs (including a reasonable profit) except for the operator's costs of purchasing and financing the lease of customer equipment.

70. Charges for leasing each type of remote control unit shall be designed to recover the operator's cost of purchasing and financing the remote, and expected repair and service charges over the useful life of the equipment. Expected repair and service

charges are to be determined by multiplying the estimated average number of repair and service hours per remote by the HSC. Charges for leasing converter boxes and all other equipment shall be calculated in the same manner as for remotes. For installation charges, the cable operator must elect a uniform installation charge that is calculated based upon either: 1) the HSC times the person hours of the visit; or 2) the HSC times the average hours spent per installation visit.

71. The Commission's guidelines do not preclude an operator from selling equipment to subscribers. The equipment price shall be set at no higher than necessary to recover the operator's costs, including all costs incurred for storing and preparing equipment for sale up to the time it is provided to the customer, including a reasonable profit. The purchaser is responsible for maintaining and repairing any purchased equipment, but cable operators may also sell service contracts. The price of these contracts shall be based on the HSC times the estimated average number of hours required for maintenance and repair over the expected life of the equipment. The cable operator shall provide notice at the time of sale that system upgrades might make a customer's purchased equipment incompatible with the new cable system technology.

(d) Promotions

72. The Commission's rules permit cable operators to offer promotions, including a permanent below cost offering of installations. However, instead of allowing cable operators unlimited discretion to price all equipment and installation below cost, the Commission is requiring that below cost offerings be reasonable in scope in relation to the operator's overall offerings in the Equipment Basket. Cable operators must exclude the costs of promotions from the Equipment Basket, but may include these costs in general overhead as part of a cost-of-service showing. The Commission will review this treatment of promotional costs when it addresses the issue of whether the Commission should take steps to promote a competitive market for equipment.

(e) Additional Connections

73. The Commission is requiring that costs associated with the installation of, and equipment used with, additional connections be included in the Equipment Basket. Cable operators will recover the costs of additional connections in the charges for installation or lease of customer equipment used with the additional connection. The installation charge for additional connections is the HSC times the person hours of the visit or the HSC times the average number of hours spent per visit. If the operator elects to use an average installation time, the Commission is requiring two rates: one for wiring additional connections at the time of the installation and another if the operator makes a

separate visit to install the additional connection. Remotes and other equipment involved are to be leased to the customer at the same rate as equipment used with primary outlets. Any network costs for boosting the signal to serve more than one outlet in a home should be treated as part of general system overhead. If a subscriber requests additional connections that exceed network design capabilities and require additional customer premises equipment, the cable operator may recover the costs of the additional equipment through an additional connection charge, developed by using the Commission's actual cost guidelines for other leased equipment.

74. The Commission also allows a cable operator, if it incurs additional charges for programming carried on basic or cable programming services channels that it transmits to additional outlets, to recover these charges through a monthly charge levied for additional outlets in fact receiving that programming.

(4) Cost of Franchise Requirements

75. The Commission has determined that costs attributable to satisfying franchise requirements shall include: 1) the sum of per channel costs for the number of channels used to meet franchise requirements for public, educational and governmental channels; 2) any direct costs of providing any other services required under the franchise; and 3) a reasonable allocation of overhead.

(5) Customer Changes

76. The Cable Act of 1992 requires that regulation for the basic tier include standards and procedures to prevent unreasonable charges for a customer changing equipment or service tiers. The Commission concludes that these regulations should apply to any changes in the number of service tiers and charges for changing equipment that are initiated at the subscriber's request after the installation of initial service. These same standards should apply to upgrades and downgrades in service tiers. Furthermore, the Commission requires that customers be allowed 30 days after notice of retiering or rate increases to change service tiers at no charge.

77. Operators may impose only a nominal charge for changing service tiers effected solely by coded entry on a computer terminal or by other similarly simple method. The Commission considers any charge under $2.00 nominal. The Commission will also allow franchising authorities the discretion to consider additional community specific factors in evaluating these charges. However, these charges cannot exceed the actual costs of changing tiers, as discussed below.

78. The Commission recognizes that charges for changing tiers have the potential to increase customer churn, but the Commission lacks specific data on this topic. Therefore, the Commission has created an exception to the cap on rates for changing service tiers effected by coded entry on a computer terminal or other similar methods. Cable operators who believe their system has an increasing and unacceptable level of churn in service tiers may establish an increased charge for changing service tiers more than two times in one year. The operator must prove to the franchising authority that the churn level in cable service tiers has reached an unacceptable level and that its escalating scale of charges is reasonable. In addition, the cable system must notify all subscribers that they will be subject to an increased charge if they change service tiers more than the specified number of times in one year.

79. For changes in service tiers or equipment that involve more than coded entry on a computer or other similarly simple method, the Commission adopts the actual cost guidelines for equipment and installation. The actual cost charge would be either the HSC times the amount of time it takes to effect the change or HSC times the average times such changes take.

4. Regulation of Cable Programming Services

a. Definition of "Cable Programming Service"

80. Under the 1992 Act, regulation of "cable programming service" rates and equipment is to be conducted by the Commission, not local franchising authorities. "Cable programming service" is defined broadly in the statute as all video programming provided over a cable system except that provided on the basic service tier or on a per-channel or per-program basis. The Commission will also exclude per-program and per-channel premium services offered on a multiplexed or time-shifted basis.

b. Complaints Regarding Cable Programming Service Rates

(1) Procedures for Receiving, Considering, and Resolving Complaints

81. The 1992 Act provides that rate regulation of cable programming services and equipment will occur only in response to specific complaints -- i.e., the Commission will not regulate cable programming service rates until it receives a complaint that a particular operator's rates are unreasonable.

82. The 1992 Act permits subscribers, franchising authorities and other relevant government entities to file complaints about the rates for cable programming services and equipment. As required by law, complainants alleging that a cable operator's current cable programming rates are unreasonable will

have 180 days from the effective date of the Commission's rules to challenge existing rates. With regard to rate increases, complainants must file complaints about cable programming service and equipment rates within 45 days from the time subscribers receive a bill that reflects the rate increase.

83. In order to avoid dismissal of a complaint, the complainant must supply certain readily available factual information and must allege that the rate is unreasonable because it violates the Commission's rate regulations. Complainants must use the complaint form adopted by the Commission and serve a copy on the cable operator and franchising authority.

84. Subscribers need not obtain the franchising authority's concurrence before filing a complaint with the Commission. However, franchising authorities are encouraged to assist subscribers in completing complaint forms and subscribers are free to attach the views of the franchising authority when submitting a complaint to the Commission. Franchising authorities will not be permitted to formally review and adjudicate cable programming service complaints in the first instance.

85. Upon receipt of a cable programming service complaint submitted on the FCC form, the Commission will review the complaint to determine whether it meets the minimum showing needed to permit the complaint to go forward. The operator must respond to a complaint filed on the standard complaint form within 30 days of service of the complaint, unless the Commission notifies the operator that the complaint fails to satisfy the minimum showing requirement.

(2) Remedial and Enforcement Procedures for Rates Found to be Unreasonable

86. If cable programming service rates are found to be unreasonable, the Commission will order the operator to reduce rates prospectively and to reflect that reduction in prospective bills to customers. The operator will also be required to refund overages (plus interest) to subscribers, with refunds being calculated from the date the complaint was filed until the date the operator implements the reduced rate prospectively in bills to subscribers.

c. Regulations Governing Rates

(1) Statutory Standards

87. The Commission concludes that standards for identifying cable programming services rates that are unreasonable in individual instances will comply with the Cable Act of 1992 if they reflect a reasoned balancing of the statutory factors and if we explain how our standards reflect these statutory factors. The

Commission finds, while not mandated by the statute, that primary weight should be given to the rates of systems subject to effective competition.

88. The Commission believes that a "bad actor" test for cable programming service rates, designed to reach those cable operators whose rates for cable programming services are "egregious" would not fulfill the mandate of the Cable Act. We conclude that Congress used the term "unreasonable" in provisions regarding cable programming services rather than "reasonable" as a reflection of the different procedural regulatory scheme for protecting consumers from excessive rates for basic and for cable programming services. Congress did not require different substantive standards. Therefore, when assessing a complaint that a cable system's cable programming service rates are unreasonable, the Commission will use the same test of reasonableness adopted for basic service rate regulation.

(2) Benchmarking versus Cost-of-Service

89. As for the basic service tier, the Commission will use a benchmark approach as the principal form of rate regulation for cable programming services, with cost-of-service showings used only by cable systems whose rates exceed the benchmark.

(3) Adoption and Application of the Benchmark and Price Cap for Cable Programming Services

90. The Commission adopted the same competitive benchmark for cable programming services as for the basic service tier and applies it in the same manner to determine the initial permitted per channel rate for cable programming services. The Commission also adopts the same price cap requirements for cable programming service as for the basic service tier, including the same annual adjustment index, and requirements for, and treatment of, external costs.

91. Systems with a per channel rate for cable programming services at or below the benchmark at the time the system becomes subject to regulatory review will be considered reasonable and that rate will be its permitted rate. Systems with rates in effect at the time of regulation that are below the benchmark will be capped at that level. For systems with rates at the time of regulation that are above the benchmark, the permitted level for such systems will be determined by a further comparison to the benchmark of rates in effect on September 30, 1992. For systems with September 30, 1992 rates that are above the benchmark, the rate shall be the September 30, 1992 per channel rate reduced by of 10 percent, but no lower than the benchmark, and then adjusted forward by inflation. For systems with rates on September 30, 1992 that were below the benchmark, the permitted rate shall be the benchmark rate adjusted forward by inflation. The price cap

will then be applied to the per channel rate determined by the above comparison of rates to the benchmark. Price cap requirements will be the same as for the basic service tier.

(4) Secondary Cost-of-Service Showings

92. As for basic service, the Commission will permit cable operators to exceed the benchmark rate for cable programming services based on costs. Similarly, the Commission will adopt cost-of-service standards for application by the Commission to determine the extent to which cable operators may exceed capped rates for cable programming services. However, as for the basic service tier, the record does not permit the Commission to fashion cost-of-service standards at this time. Accordingly, we will adopt and issue separately a Second Further Notice to establish cost-of-service standards for cable services including cable programming services.

(5) Installation or Rental of Equipment Used to Receive Cable Programming Services

(a) Equipment Subject to Regulation as Cable Programming Services

93. Complaints concerning rates for equipment and installation used to receive cable programming services, either solely or in conjunction with unregulated programming, shall be subject to the same actual cost standard implemented for basic tier equipment and installation. The costs of equipment and installation used to receive cable programming services shall be included in the Equipment Basket and the charges associated with this equipment shall be determined on the same basis as charges for other equipment subject to the actual cost methodology. However, because the Commission has jurisdiction over cable programming services, it will review any complaints or issues concerning such equipment or installation.

(b) Unbundling of Rates for Installation and Rental of Equipment Used to Receive Cable Programming Services

94. The Commission concludes that cable operators should be required to unbundle equipment and installation rates from equipment used to receive these services. The Commission also concludes that cable operators shall be required to unbundle installation rates for cable programming services from rates for equipment leasing.

5. Provisions applicable to Cable Service Generally

a. Geographically Uniform Rate Structure

95. The Cable Act of 1992 requires cable operators to "have a rate structure, for the provision of cable service, that is uniform throughout the geographic area in which cable service is provided over its cable system." The Commission concludes that a cable system must have a uniform rate structure throughout the franchise area. This requirement, however, does not preclude operators from establishing reasonable categories of customers and services. The Commission concludes that for purposes of the Cable Act of 1992 a geographic area means the franchise area. Thus, a cable operator is generally required by this provision to have a uniform rate structure within each franchise area.

b. Discrimination

96. A cable operator may offer reasonable discounts to senior citizens and other economically disadvantaged individuals. For this purpose, an "economically disadvantaged individual" is defined as a person who receives federal, state or local welfare assistance.

c. Negative Option Billing

97. The 1992 Act provides that an operator may not charge a subscriber for "any service or equipment that the subscriber has not affirmatively requested by name." This limitation on so-called "negative option billing" applies whenever a new tier or single channel service is added. However, restructuring undertaken to respond to the Commission's new rate regulations will not bring the negative option billing provision into play as long as subscribers continue to receive the same number of channels and the same equipment, and the total price for the services does not change. On a going-forward basis, the provision does not apply to changes in the mix of channels in a tier, or restructurings of service, even when those changes are accompanied by a rate increase, unless the changes alter the fundamental nature of the service tier.

d. Collection of Information

98. The Commission at this time will not establish collection of information requirements. The Commission will explore this issue in a Second Further Notice in the future.

e. Prevention of Evasions:

99. Prohibited "evasions" are defined as any practice or action which avoid the rate regulation provisions of the 1992 Act or the Commission's rules contrary to the intent of the Act or its underlying policies.

f. Small System Burdens

100. Franchise authorities regulating small cable systems are permitted to exempt those systems from having to file an initial rate schedule with the franchising authority. In such cases, the small system need simply certify to the authority that its rates for basic service and equipment are reasonable and are within the applicable benchmark formula. However, a small system whose rates exceed the benchmark, a small system proposing to increase its basic service rates or a small system that is the subject of a cable programming service complaint is not exempted from the procedures the Commission has established. For these purposes, a "small system" is a system served by an integrated headend with fewer than 1,000 subscribers.

g. Grandfathering of Rate Agreements

101. Franchising authorities already regulating rates pursuant to a franchise agreement executed before July 1, 1990 may continue to regulate basic service and equipment rates for the remainder of the franchise term without following the Commission's substantive rate standards and without filing a certification with the Commission. Authorities with agreements signed after that date must be certified by the Commission.

h. Reports on Average Prices

i. Effective Date

102. The Cable Act of 1992 states that the amendments to Section 623 of the Communications Act that mandate rate regulation by the Commission of cable systems that are not subject to effective competition shall become effective 180 days from the date of the enactment of the Act. The Commission concludes that by adopting the Report and Order it meets the effective date requirements of the Cable Act of 1992. The Commission establishes June 21, 1993 as the effective date of its regulations adopted in the Report and Order.

B. Leased Commercial Access

1. Leased Access: Background

103. The Communications Act requires that cable systems with 36 or more channels make available a portion of their channel capacity for lease by outside unaffiliated parties. Under the Cable Act of 1992, the Commission is provided with expanded authority to regulate the commercial leasing of cable channels for those cable systems required to make such channel capacity available.

2. Leased Access: Terms and Conditions of Use

104. A the cable operator and commercial leased access user may negotiate channel placement and tier access for leased programming. Parties must take into account the nature of the service; the relationship between the charge imposed and the desirability of the channel; and, the need to provide competition in delivery service and diversity of programming. Cable operators may not apply programming production standards to leased access users that are any higher than those applied to PEG channels. Operators must also provide the minimal amount of technical support necessary for users to air their material. Operators are also entitled to be reimbursed for such services. Reasonable security deposits to lease channels may be requested from users by cable operators. Cable operators may not set terms and conditions for users based on content except to the extent necessary to establish a reasonable price for use of channel capacity and to comply with the Commission's indecency standards. Cable operators are also required to provide billing and collection services for leased access users, unless the operator demonstrates the existence of third party billing and collection services which in terms of cost and accessibility, offer leased access users an alternative substantially equivalent to that offered comparable non-leased programmers.

3. Leased Access: Maximum Reasonable Rates

a. Leased Access

105. The maximum commercial leased access rates that a cable operator may charge is the highest net implicit fee charged any nonaffiliated programmer within the same program category. The implicit rate is calculated by determining the amount paid per month by subscribers for the service and deducting from that the amount that is paid per month to the programming service vendor. The difference between the amount received and the amount paid is the net implicit leased channel rate. Such rates are to be calculated separately for (1) pay-per-program or pay channels, (2) channels containing more than fifty percent direct sales (home shopping networks), (3) and all other channels.

b. Access Rates for Not-for-Profit-Programmers

106. The Commission declines to establish special rates for not-for-profit programmers, or to require that operators set-aside capacity for such purposes. The Commission finds that the procedures adopted for establishing maximum reasonable rates adequately ensure that the interests of such programmers are considered.

4. Leased Access: Reporting Requirements

107. Although specific reporting requirements for leased access will not be implemented, the Commission will gather necessary leased access information on leased channel usage and rates in its general reporting and monitoring process mechanisms for cable systems.

5. Leased Access: Procedures for Resolution of Disputes

108. Review of leased access rates or terms and conditions will be triggered by the filing of a complaint at the Commission. A streamlined process has been developed to handle these complaints so that they can be handled expeditiously.

6. Leased Access: Minority and Educational Programmers Alternative

109. In accordance with the statutory provisions, up to 33 percent of a system's designated leased channel capacity may be used for qualified minority or educational programming purchased by the system operator rather than by leased channel programming.

C. Subscriber Bill Itemization

110. Cable operators may identify as a separate line item on each subscriber bill the amount of any fee, tax, assessment or charge imposed by a government entity on the transaction between the operator and the subscriber.

D. Cost Accounting/Cost Allocation Requirements

111. The rate regulations that the Commission has adopted impose a price cap on cable service rates with certain categories of costs defined as external to the cap. Cost accounting and cost allocation requirements are necessary to assure that costs that are intended to receive external treatment are in fact accorded such treatment. The regulations additionally authorize cable operators to make cost-of-service showings to justify a rate higher than the capped level. Cost accounting and cost allocation requirements are also necessary to permit identification of costs that will justify a rate above the cap.

112. The Commission has an insufficient record on which to determine the optimum level of rate averaging for the cable industry. Accordingly, while the Commission is adopting in the Report and Order requirements that will permit immediate implementation of our rules, the Commission has determined that it will include in a Second Further Notice issues pertaining to what cost accounting and cost allocation requirements should be adopted on a permanent basis.

113. The cost accounting rules the Commission adopts will nevertheless permit a successful immediate implementation of rate regulations. Cable operators are required to identify certain locally incurred costs such as franchise fees and local taxes at the franchise level. For purposes of calculating external costs or cost of service, cable operators shall identify costs at the level at which, for accounting purposes, they identified the category of costs on April 3, 1993. Cable operators are required to justify and explain this identification and that it is, in fact, the level used to identify costs on April 3, 1993. Costs are then to be allocated to the franchise level on a per subscriber basis.

III. Further Notice of Proposed Rulemaking

114. The Commission solicits comment on whether we should, and may lawfully, exclude the rates of systems in low penetration areas in calculating the competitive rate differential. The Report and Order explains that we calculated the competitive rate differential based on a comparison of data collected from systems subject to effective competition with data from systems not subject to effective competition. Our industry survey was based on data from systems subject to effective competition under each of the three independent statutory criteria used to define effective competition in Section 3 of the 1992 Cable Act, including systems expected to have less than 30 percent cable penetration. It is possible, however, that exclusion from our sample of rates of systems in low penetration areas may produce a better measure of competitive rate differential because low penetration may be attributable to factors other than the presence of competition. Our preliminary analysis reveals that the exclusion of low penetration systems will produce a competitive rate differential of between 25 and 30 percent.

APPENDIX B -- LIST OF COMMENTING PARTIES

APPENDIX B

COMMENTS

Abbreviation	Commenter
AAPTS	Assoc. of America's Public Television Stations
ACI	Alaska Cablevision, Inc.
AdelphiaII	Adelphia Communications Corp., et. al
AEN	Arts and Entertainment Network
AGs	Attorneys General of PA, Mass, NY, Ohio and TX
Alternative	Alternative Museum
APPA	American Public Power Association
ARC	Adhoc Rural Consortium
Armstrong	Armstrong Utilities, Inc.
Atlanta	City of Atlanta, GA.
Austin	Austin, TX; Dayton, OH; Dubuque, IW; Gillette, WY; Montgomery County, MD; St. Louis, MO; and Wadsworth, OH. Austin Cable Commission
Baloga	Al J. Baloga
Baltimore	Mayor and City of Baltimore, MD.
Bandon	City of Bandon, OR.
BellAtlantic	Bell Atlantic
BellSouth	BellSouth
Blade	Blade Communications, Inc.; Multivision Cable TV Corp.; Providence Journal Company; Sammons Communications, Inc.
BowlingGreen	City of Bowling Green, KY
Broward	Continental Cablevision of Broward County, Inc.
CalCities	League of California Cities
Camnitzer	Mr. Rolf Camnitzer
Carbondale	City Attorney of Carbondale, IL.
Carib	Caribbean Communications Corp.
Carper	Ricky L. Carper
Carson	City of Carson, CA.
CATA	Community Antenna Television Association, Inc.
CBA	Community Broadcasters Association
CCA	Competitive Cable Association
CCW	Cable Communications of Willsboro, N.Y.
CFA	Consumer Federation of America
Chico	City of Chico, CA [informal]
CIC	Cablevision Industries Corporation
Cleburne	City of Cleburne, TX
Cole	Cole, Raywid & Braverman
Comcast	Comcast Corporation
Commerce	City of Commerce, California; Communications Support Group, Inc.
Conn	Attorney General of State of Connecticut
Conneaut	City of Conneaut, OH

Continental	Continental Cablevision, Inc.
Cox	Cox Communications
CSC	Cablevision Systems Corporation
CTANY	Cable Television Association of New York, Inc.
Dade	Metropolitan Dade County, FL.
Denison	City of Denison, TX
DirectTV	DirectTV, Inc.
Discovery	Discovery Communications, Inc.
Dover	Municipal Franchising Authorities of Dover, DE, et. al
Drexel	Town of Drexel, N.C.
DRG	Dispute Resolution Group, Inc.
Eberhardt	Clifford Eberhardt
EET	E! Entertainment Television, Inc.
EIA	Consumer Electronics Group of the Electronic Industries Association
Elgin	Duane Elgin
Encore	Encore Media Corporation
ESPN	ESPN, Inc.
Falcon	The Falcon Cable Group
Fall	City of Fall River, MA
Fanch	Fanch Communications, Inc. and Mission Cable Co., L.P.
Fort Lauderdale	City of Fort Lauderdale, FL.
Fox	Fox, Inc.
FUSE	FUSE
Funk	Nancy L. Funk
Glasgow	Electronic Plant Board of the City of Glasgow, KY.
GTE	GTE Service Corporation
Harron	Harron Communications Corporation
Hayes	Marc F. Hayes
HayesL	Luella Hayes
HBO	HBO letter to affiliates
Hyder	Sid N. Hyder
IFE	International Family Entertainment, Inc.
InterMedia	InterMedia Partners
Inverness	Cities of Inverness, Crystal River, Dunnellon and Town of McIntosh, FL.
Kansas	League of Kansas Municipalities
Key West	City of Key West, FL.
LeBoeuf	LeBoeuf, Lamb, Leiby & MacRae
Lenfest	Lenfest Group
Liberty	Liberty Cable Company, Inc.
Lifetime	Lifetime Television
Linsalata	Mr. and Mrs. Randolph Linsalata
Lyons	Timothy J. Lyons
MACC	Metropolitan Area Communications Commission on behalf of Washington County, Oregon, and the cities of Banks, Beaverton, Cornelius, Durham, Forest Grove, Gaston, Hillsboro, King City, Lake Oswego, North Plains, Rivergrove,

	Sherwood, Tigard, Tualatin, and Wilsonville, OR.
Manitowoc	City of Manitowoc, WI.
Marion	City of Marion, N.C.
Matas	David Matas
MCATC	Massachusetts Community Antenna Television Commission
McKinney	City of McKinney, TX.
MCSI	Multichannel Communications Sciences, Inc.
MEA	Center for Media Education Assoc. of Independent Video and FilmMakers
Medford	Medford Cable Television
MediaGeneral	Media General Cable of Fairfax Inc.
Mesa	City of Mesa, Arizona
MGB	MGB Associates, Inc.
Miami Beach	City of Miami Beach, FL.
Mindler	Dan Mindler
Minn	Political Subdivisions of the State of Minnesota
Monroe	Monroe County, FL.
Montana	Montana Public Service Commission
Moraga	Town of Moraga, CA.
Mountain	Mountain Cablevision, Inc.
MPAA	Motion Picture Association of America, Inc.
Multiplex	Multiplex Technology, Inc.
Municipal	Coalition of Municipal and other Local Governmental Franchising Authorities
Muskegon	City of Muskegon, MI
MUZAK	MUZAK Limited Partnership
NAB	National Association of Broadcasters
Nadue	Bernard E. Nadeu
NARUC	National Association of Regulatory Utility Commissioners
Nashoba	Nashoba Communications Limited Partnership
Nationwide	Nationwide Communications, Inc.
NATOA	National Assoc. of Telecommunications Officers and Advisors, National League of Cities, U.S. Conference of Mayors, and the National Assoc. of Counties
NCI	National Captioning Institute, Inc.
NCC	Northland Communications Corporation
NCTA	National Cable Television Association, Inc.
NECTA	New England Cable Television Association, Inc.
NewBedford	Mayor of the City of New Bedford, MA.
NewBern	City of New Bern, N.C.
Newell	Marjorie S. Newell, Ph.D.
Newhouse	Newhouse Broadcasting Corporation
911	911 Arts Center
NJ	State of New Jersey, Board of Regulatory Commissioners
NMCC	Northwest Municipal Cable Council
NTCA	National Telephone Cooperative Association

NorthRedington	Town of North Redington, FL.
NYSCCT	New York State Commission on Cable Television
NYConsumers	New York State Consumer Protection Board
NYNEX	NYNEX Telephone Companies
Oakland Cable	Oakland County Cable
Oxnard	Mayor of Oxnard, CA.
PacTel	Pacific Telesis Group, Pacific Bell, and Nevada Bell
Paducah	City of Paducah, KY.
Palm Desert	City of Palm Desert, CA.
Pappas	James Pappas
Parsippany	Township of Parsippany-Troy Hills, N.J.
Peterson	Leona Peterson
Policy	Policy Communications, Inc.
PR	Puerto Rico Cable TV Association
Prime	Prime Cable
Randolph	Randolph Township Council, Randolph, New Jersey
Rapids	Greater Grand Rapids Area Cable Commission and Cities of New Ulm, Minnesota, and Savage, MN.
Raufer	William B. Raufer
Rocky	City of Rocky Mount, N.C.
Salisbury	City of Salisbury, MD.
SantaClarita	City of Santa Clarita
Savage	City of Savage, MN.
Schaumburg	Village of Schaumburg, IL.
San Diego	City of San Diego
SDA	Satellite Dealers Association, Inc.
Seebol	Edward A. Seebol
Sioux	City of South Sioux City, NE.
Simmons	Simmons Communication
SmallSystems	Consortium of Small Cable System Operators
Somerville	Mayor and City of Somerville, MA.
Spring	Township of Spring Berks County, PA.
SquareD	Square D Company
StarCable	Star Cable Associates
Sterling	City of Sterling, CO.
St.Louis	Park City of St. Louis Park, MN [informal]
Stookey	Richard Stookey to Sen. Seymour
St.Petersburg	City of St. Petersburg, FL
Tallahassee	City of Tallahassee, FL.
TBS	Turner Broadcasting System, Inc.
TCI	Tele-Communications, Inc.
TexasStudent	Texas Student Television
ThousandOaks	City of Thousand Oaks, CA.
TIA	Fiber Optics Div., Telecommunications Industry Assoc.
TimeWarner	Time Warner Entertainment Company
USA	USA Networks
USTA	United States Telephone Association
Veraldi	Ms. Lorna Veraldi
Video	Video Data Bank

Westec	Westec Cablevision
Williamston	Town of Williamston, N.C.
Winter Park	City of Winter Park, FL
Winthrop	Winthrop Community Access Television
Wireless	Wireless Cable Association International, Inc.
Zimny	Alexander J. Zimny

REPLY COMMENTS

Abbreviations	Reply Commenters
AdelphiaI	Adelphia Communications Corporation
AdelhiaII	Adelphia Communications Corporation
ARC	AdHoc Rural Consortium
ACI	Alaska Cablevision, Inc.
APPA	American Public Power Association
Atlanta	City of Atlanta, GA.
Austin	Austin, TX; Dayton, OH; Dubuque, IA; Gillette,WY; Miami Valley, OH; Montgomery County, MD; St. Louis, MI; & Wadsworth, OH.
Ayden	The Town of Ayden, North Carolina
Bayonne	The City of Bayonne, New Jersey
BellAtlantic	Bell Atlantic
BellSouth	Bell South
Bloomingdale	Bloomingdale Communications Inc., CTS Communications Corporation and T.V.C., Inc. (filed Jan. 29, 1993)
Boston	City of Boston
Bowling Green	Bowling Green, Kentucky
Burnsville	Burnsville/Eagan Cable Communications Commission
California Cable	California Cable Television Association
CalCities	League of California Cities & Associated Entitles
Chandler	City of Chandler, Arizona
Charlotte	City of Charlotte and Mecklenburg County, N.C.
CIC	Cablevision Industries
Cincinnati	City of Cincinnati, Ohio
Clinton	City of Clinton, South Carolina
Coffeyville	City of Coffeyville, KS.
Cole	Cole, Raywid, & Braverman
Comcast	Comcast Corporation
CBA	The Community Broadcasters Association
CFA	Consumer Federation of America
Continental	Continental Cablevision, Inc.
Dade	Metropolitan Dade County
Dearborn	The City of Dearborn
Denver	Denver Area Educational Telecommunications Consortium
Discovery	Discovery Communications, Inc.
Disney	The Disney Channel
EIA	Electronics Group of The Electronic Industries Association
Fairborn	City of Fairborn, Ohio
Fairfax	Fairfax County, Virginia
Falcon	Falcon Cable Group
Fort Lauderdale	City of Fort Lauderdale, Florida
Garden City	City of Garden City, Kansas

Georgetown	City of Georgetown, South Carolina
Greensboro	City of Greensboro, North Carolina
Greenville	City of Greenville, North Carolina
GTE	GTE Service Corporation
Hastings	City of Hastings, Minnesota
Hawaii	State of Hawaii
Hays	City of Hays
Henderson	City of Henderson, North Carolina
Hollywood	City of Hollywood, Florida
Indian River	Indian River County, Florida
INTV	Association of Independent Television Stations
IowaCity	City of Iowa City, Iowa
Junction	City of Junction City
Kinston	City of Kinston, North Carolina
Lake Forest	City of Lake Forest
Lakeville	City of Lakeville
Laurinburg	City of Laurinburg, North Carolina
Laurens	City of Laurens, South Carolina
Liberal	City of Liberal, Kansas
Liberty	Liberty Cable Company, Inc.
Lincoln Park	City of Lincoln Park
LosAngeles	City of Los Angeles, California
Louisville	City of Louisville, Kentucky
LowerMerion	Township of Lower Merion, Montgomery Council, PE
Madison	City of Madison Heights, Michigan
Mankato	Cities of Mankato & North Mankato
Marshall	City of Marshall, Texas
MCATC	Massachusetts Community Antenna Television Commission
MEA	Media Education Association
Mentor	City of Mentor
MACC	Metropolitan Area Communication Commission
MtProspect	Village of Mount Prospect
Multiplex	Multiplex Technology, Inc.
Multnomah	Multnomah Cable Regulation Commission
Municipal	Coalition of Municipal and Other Local Governmental Franchising Authorities
NAB	National Association of Broadcasters
NCTA	National Cable Television Association, Inc.
NATOA	National Association of Telecommunications Officers and Advisors
NECTA	New England Cable Television Association, Inc.
Newhouse	Newhouse Broadcasting Corporation
NYC	New York City Department of Telecommunications & Energy
Niles	Village of Niles, Illinois
NYNEX	Nynex Telephone Companies
Oakland	City of Oakland, California
Ottawa	City of Ottawa, Kansas
Owensboro	City of Owensboro, Kentucky

PacTel	Pacific Telesis Group, Pacific Bell and Nevada Bell
Palm Desert	City of Palm Desert
Phillipsburg	City of Phillipsburg, Kansas
Piscataway	City of Piscataway Township, New Jersey
Ramsey	Ramsey/Washington Counties Suburban Cable
PrinceGeorge	County of Prince George's
Rapids	Greater Grand Rapids Area Cable Commission and Cities
Reidsville	City of Reidsville, North Carolina
Salina	City of Salina
SanAntonio	City of San Antonio
SBA	Chief Counsel for Advocacy of the United States Small Business Administration
SSO	Coalition of Small System Operators
Small Systems	Consortium Small Cable System Operators
SquareD	Square D Company
Tallahassee	City of Tallahassee
TCI	Tele-Communications, Inc.
TIA	Fiber Optics Div., Telecommunications Industry Assoc.
TimeWarner	Time Warner Entertainment Company, L.P.
Titusville	City of Titusville, Florida
Union	City of Union, South Carolina
USA	USA Networks
USCC	United States Catholic Conference
USTA	United States Telephone Association
Ventura	Ventura County Cablevision
Walkerton	Town of Walkerton, Indiana
Watertown	City of Watertown, New York
WestVirginia	West Virginia Cable Television Advisory Board
Wireless	Wireless Cable Association International, Inc.
Worthington	City of Worthington, Ohio

INFORMAL REPLY COMMENTS CITED IN TEXT

Abbreviation	Commenter
Baltimore	Mayor and City Council of Baltimore (corrected copy filed Feb. 12, 1993)
Charlotte	City of Charlotte and Mecklenburg County, North Carolina (filed Feb. 12, 1993)
Coffeyville	City of Coffeyville, Kansas (filed Feb. 12, 1993)
CSG	Communications Support Group (filed Feb. 12, 1993)
Lake Minnetonka	Lake Minnetonka Cable Communications Commission (filed Feb. 12, 1993)
NYState	New York State Commission on Cable Television (filed Feb. 12, 1993)
SBCA	Satellite Broadcasting and Communications Association of America (filed Feb. 24, 1993)

APPENDIX C -- RULES

APPENDIX C

Parts 0 and 76 of Chapter I of Title 47 of the Code of Federal Regulations are amended as follows:

Part 0 COMMISSION ORGANIZATION

1. The authority citation for Part 0 continues to read as follows:

Authority: Secs. 5, 48 Stat. 1068, as amended; 47 U.S.C. 155.

2. Section 0.61 is amended by adding paragraphs (j) through (m) to read as follows:

MASS MEDIA BUREAU

§ 0.61 Functions of the Bureau.

* * * * *

(j) After Commission assumption of jurisdiction to regulate cable television rates for basic service and associated equipment, acts upon cable operator requests for approval of existing or increased rates.

(k) Reviews appeals of local franchise authorities rate making decisions involving rates for the basic service tier and associated equipment, except when such appeals raise novel or unusual issues.

(l) Acts upon complaints involving cable programming service rates except for final action on complaints raising novel or unusual issues.

(m) Evaluates certification requests filed by cable system franchising authorities pursuant to Subpart N, Part 76 of this chapter.

(n) Periodically reviews and, when appropriate, revises standard forms used in administering;

(1) The Commission's complaint process regarding cable programming service rates;

(2) The certification process for local franchising authorities wishing to regulate rates, and

(3) The substantive rate regulation standards prescribed by the Commission.

3. Section 0.455 is amended by adding paragraphs (a)(11) and (12) to read as follows:

§ 0.455 Other locations at which records may be inspected.

(a) * * *

(11) All complaints against cable television operators filed under §§ 76.950 and 76.951 of this chapter, all documents filed in connection therewith, and all communications related thereto, unless the cable operator has submitted a request pursuant to § 0.459 that such information not be made routinely available for public inspection.

(12) All cable operator requests for approval of existing or increased cable television rates for basic service and associated equipment over which the Commission has assumed jurisdiction pursuant to 47 C.F.R. §§ 76.913, and 76.943, all documents filed in connection therewith, and all communications related thereto, unless the cable operator has submitted a request pursuant to § 0.459 that such information not be made routinely available for public inspection.

* * * * *

Part 76 CABLE TELEVISION SERVICE

4. The authority citation for Part 76 is revised to read as follows:

AUTHORITY: Secs. 2, 3, 4, 301, 303, 307, 308, 309, 48 Stat., as amended, 1064, 1065, 1066, 1081, 1082, 1083, 1084, 1085, 1101; 47 U.S.C. Secs. 152, 153, 154, 301, 303, 307, 308, 309, 532, 533, 535, 542, 543, 552 as amended, 106 Stat. 1460.

5. Section 76.5 is revised by removing paragraph (gg).

6. Section 76.10 is removed.

7. Section 76.33 is removed.

8. Section 76.900 is removed and redesignated as Section 76.986.

9. Sections 76.803 through 76.999 are reserved.

10. Section 76.1090 is removed and renumbered as Section 76.900.

11. Subpart N is added to read as follows:

Subpart N -- Cable Rate Regulation

Sec.

76.900 Temporary freeze of cable rates.

76.901 Definitions.
76.905 Standards for identification of cable systems subject to effective competition.
76.906 Presumption of no effective competition.
76.910 Franchising authority certification.
76.911 Petition for reconsideration of certification.
76.912 Joint certification.
76.913 Assumption of jurisdiction by the Commission.
76.914 Revocation of certification.
76.915 Change in status of cable operator.
76.916 Petition for recertification.
76.920 Composition of the basic tier.
76.921 Buy-through of other tiers prohibited.
76.922 Rates for the basic service tier and cable programming services tiers.
76.923 Rates for equipment and installation used to receive the basic service tier.
76.924 Cost accounting and cost allocation requirements.
76.925 Costs of franchise requirements.
76.930 Initiation of review of basic cable service and equipment rates.
76.931 Notification of basic tier availability.
76.932 Notification of proposed rate increase.
76.933 Franchising authority review of basic cable rates and equipment costs.
76.934 Small system review.
76.935 Participation of interested parties.
76.936 Written decision.
76.937 Burden of proof.
76.938 Proprietary information.
76.940 Prospective rate reduction.
76.941 Rate prescription.
76.942 Refunds.
76.943 Fines.
76.944 Commission review of franchising authority decisions on rates for the basic service tier and associated equipment.
76.945 Procedures for Commission review of basic service rates.
76.950 Complaints regarding cable programming service rates.
76.951 Standard complaint form; other filing requirements.
76.952 Information to be provided by cable operator on monthly subscriber bills.
76.953 Limitation on filing a complaint.
76.954 Initial review of complaint; minimum showing requirement; dismissal of defective complaints.
76.955 Additional opportunity to file corrected complaint.
76.956 Cable operator response.
76.957 Commission adjudication of the complaint.
76.960 Prospective rate reductions.
76.961 Refunds.
76.962 Implementation and certification of compliance.
76.963 Forfeiture.
76.964 Advance written notification of rate increases.

76.970 Commercial leased access rates.
76.971 Commercial leased access terms and conditions.
76.975 Commercial leased access dispute resolution.
76.977 Minority and educational programming used in lieu of deregulated commercial leased access capacity.
76.980 Charges for customer changes.
76.981 Negative option billing.
76.982 Continuation of rate agreements.
76.983 Discrimination.
76.984 Geographically uniform rate structure.
76.985 Subscriber bill itemization.

Subpart N Cable Rate Regulation

§ 76.900 Temporary freeze of cable rates.

(a) The average monthly subscriber bill for services provided by cable operators subject to regulation under Section 623 of the Communications Act shall not increase above the average monthly subscriber bill determined under rates in effect on April 5, 1993, for a period of 120 days.

(b) The average monthly subscriber bill shall be calculated by determining for a monthly billing cycle the sum of all billed monthly charges for all cable services subject to regulation under Section 623 of the Communications Act and dividing that sum by the number of subscribers receiving any of those services. The average monthly subscriber bill determined under rates in effect on April 5, 1993, shall be calculated based on customer charges for the most recent monthly billing cycle ending prior to April 5, 1993.

§ 76.901 Definitions.

(a) Basic service. The basic service tier shall, at a minimum, include all signals of domestic television broadcast stations provided to any subscriber (except a signal secondarily transmitted by satellite carrier beyond the local service area of such station, regardless of how such signal is ultimately received by the cable system) any public, educational, and governmental programming required by the franchise to be carried on the basic tier, and any additional video programming signals a service added to the basic tier by the cable operator.

(b) Cable programming service. Cable programming service includes any video programming provided over a cable system, regardless of service tier, including installation or rental of equipment used for the receipt of such video programming, other than:

(1) Video programming carried on the basic service tier as defined in this section;

(2) Video programming offered on a pay-per-channel or pay-per-program basis; or

(3) A combination of multiple channels of pay-per-channel or pay-per-program video programming offered on a multiplexed or time-shifted basis so long as the combined service:

(i) Consists of commonly-identified video programming; and

(ii) Is not bundled with any regulated tier of service.

(c) Small system. A small system is a cable television system that serves fewer than 1,000 subscribers. The service area of a small system shall be determined by the number of subscribers that are served by a system's principal headend, including any other headends or microwave receive sites that are technically integrated to the system's principal headend.

§ 76.905 Standards for identification of cable systems subject to effective competition.

(a) Only the rates of cable systems that are not subject to effective competition may be regulated.

(b) A cable system is subject to effective competition when any one of the following conditions is met:

(1) Fewer than 30 percent of the households in its franchise area subscribe to the cable service of a cable system.

(2) The franchise area is:

(i) Served by at least two unaffiliated multichannel video programming distributors each of which offers comparable programming to at least 50 percent of the households in the franchise area; and

(ii) The number of households subscribing to multichannel video programming other than the largest multichannel video programming distributor exceeds 15 percent of the households in the franchise area.

(3) A multichannel video programming distributor, operated by the franchising authority for that franchise area, offers video programming to at least 50 percent of the households in the franchise area.

(c) Each separately billed or billable customer will count as a household subscribing to or being offered video programming services, with the exception of multiple dwelling buildings billed as a single customer. Individual units of multiple dwelling buildings will count as separate households.

(d) A multichannel video program distributor, for purposes of this section, is an entity such as, but not limited to, a cable operator, a multichannel multipoint distribution service, a direct broadcast satellite service, a television receive-only satellite program distributor, a video dialtone service provider, or a satellite master antenna television service provider that makes available for purchase, by subscribers or customers, multiple channels of video programming.

(e) Service of a multichannel video programming distributor will be deemed offered:

(1) When the multichannel video programming distributor is physically able to deliver service to potential subscribers, with the addition of no or only minimal additional investment by the distributor, in order for an individual subscriber to receive service; and

(2) When no regulatory, technical or other impediments to households taking service exist, and potential subscribers in the franchise area are reasonably aware that they may purchase the services of the multichannel video programming distributor.

(f) For purposes of determining the number of households subscribing to the services of a multichannel video programming distributor other than the largest multichannel video programming distributor, under para. (b)(2)(ii) of this section, the number of subscribers of all multichannel video programming distributors that offer service to at least 50 percent of the households in the franchise area will be aggregated.

(g) In order to offer comparable programming within the meaning of para. (b)(2)(i) of this section, a competing multichannel video programming distributor must offer at least 12 channels of video programming, including at least one channel of nonbroadcast service programming.

§ 76.906 Presumption of no effective competition.

In the absence of a demonstration to the contrary, cable systems are presumed not to be subject to effective competition.

§ 76.910 Franchising authority certification.

(a) A franchising authority must be certified by the Commission in order to regulate the basic service tier and associated equipment of a cable system within its jurisdiction.

(b) To be certified, the franchising authority must file with the Commission a written certification that:

(1) The franchising authority will adopt and administer regulations with respect to the rates for the basic service tier that are consistent with the regulations prescribed by the Commission for regulation of the basic service tier;

(2) The franchising authority has the legal authority to adopt, and the personnel to administer, such regulations;

(3) Procedural laws and regulations applicable to rate regulation proceedings by such authority provide a reasonable opportunity for consideration of the views of interested parties; and

(4) The cable system in question is not subject to effective competition. Unless a franchising authority has actual knowledge to the contrary, the franchising authority may rely on the presumption in § 76.906 that the cable operator is not subject to effective competition.

(c) The written certification described in para. (b) of this section shall be made by filing the FCC form designated for that purpose. The form must be filed by

(1) Registered mail, return receipt requested, or

(2) Hand-delivery to the Commission and a date-stamped copy obtained. The date on the return receipt or on the date-stamped copy is the date filed.

(d) A copy of the certification form described in para. (c) of this section must be served on the cable operator before or on the same day it is filed with the Commission.

(e) Unless the Commission notifies the franchising authority otherwise, the certification will become effective 30 days after the date filed, provided, however, that the franchising authority may not regulate the rates of a cable system unless it:

(1) Adopts regulations:

(i) Consistent with the Commission's regulations governing the basic tier; and

(ii) Providing a reasonable opportunity for consideration of the views of interested parties, within 120 days of the effective date of certification; and

(2) Notifies the cable operator that the authority has been certified and has adopted the regulations required by paragraph (e)(1) of this section.

(f) If the Commission denies a franchising authority's certification, the Commission will notify the franchising authority of any revisions or modifications necessary to obtain approval.

§ 76.911 Petition for reconsideration of certification.

(a) A cable operator (or other interested party) may challenge a franchising authority's certification by filing a petition for reconsideration. The petition may allege either of the following:

(1) The cable operator is not subject to rate regulation because effective competition exists as defined in § 76.905.

(2) The franchising authority does not meet the certification standards set forth in 47 U.S.C. § 543(a)(3).

(b)(1) The cable operator bears the burden of rebutting the presumption that effective competition does not exist with evidence that effective competition, as defined in § 76.905, exists in the franchise area.

(2) For purposes of paragraph (a)(1) of this section, if the evidence establishing effective competition is not otherwise available, cable operators may request from a competitor information regarding the competitor's reach and number of subscribers. A competitor must respond to such request within 15 days. Such responses may be limited to numerical totals.

(c) Stay of rate regulation.

(1) The filing of a petition for reconsideration pursuant to paragraph (a)(1) of this section will automatically stay the imposition of rate regulation pending the outcome of the reconsideration proceeding.

(2) A petitioner filing pursuant to paragraph (a)(2) of this section may request a stay of rate regulation.

(3) In any case in which a stay of rate regulation has been granted, if the petition for reconsideration is denied, the cable operator may be required to refund any rates or portion of rates above the permitted tier charge which were collected from the date the petition was filed.

(d) The filing of a petition for reconsideration alleging the presence of effective competition based on frivolous grounds is prohibited, and may be subject to forfeitures.

(e) If the Commission upholds a challenge to a certification filed pursuant to paragraph (a)(2) of this section, the Commission will notify the franchising authority of the revisions necessary to secure approval and provide the authority an opportunity to amend its

certification however necessary to secure approval. Provided, however, that pending approval of certification, the Commission will assume jurisdiction over basic cable service rates in that franchise area.

§ 76.912 Joint certification.

(a) Franchising authorities may apply for joint certification and may engage in joint regulation, including, but not limited to, joint hearings, data collection, and ratemaking. Franchising authorities jointly certified to regulate their cable system(s) may make independent rate decisions.

(b) Franchising authorities may apply for joint certification regardless of whether the authorities are served by the same cable system or by different cable systems and regardless of whether the rates in each franchising area are uniform.

§ 76.913 Assumption of jurisdiction by the Commission.

(a) Upon denial or revocation of the franchising authority's certification, the Commission will regulate rates for cable services and associated equipment of a cable system not subject to effective competition, as defined in § 76.905, in a franchise area. Such regulation by the Commission will continue until the franchising authority has obtained certification or recertification.

(b) A franchising authority unable to meet certification standards may petition the Commission to regulate the rates for basic cable service and associated equipment of its franchisee when:

(1) The franchising authority lacks the resources to administer rate regulation; provided, however, that the request must be accompanied by a demonstration that franchise fees are insufficient to fund any additional activities required to administer basic service rate regulation; or

(2) The franchising authority lacks the legal authority to regulate basic service rates; provided, however, that the authority must submit with its request a statement detailing the nature of the legal infirmity.

(c) The Commission will regulate basic service rates pursuant to this Section until the franchising authority qualifies to exercise jurisdiction pursuant to § 76.916.

§ 76.914 Revocation of certification.

(a) A franchising authority's certification shall be revoked if:

(1) After the franchising authority has been given a reasonable opportunity to comment, it is determined that state and local laws

and regulations do not conform to the Commission's rate regulations governing cable rates, §§ 76.922 through 76.925.

(2) After being given an opportunity to cure the defect, a franchising authority fails to fulfill one of the three conditions for certification, set forth in 47 U.S.C. § 543(a)(3), or any of the provisions of §§ 76.910(b).

(b) In all cases of revocation, the Commission will assume jurisdiction over basic service rates until an authority becomes recertified. The Commission will also notify the franchising authority regarding the corrective action that may be taken.

(c) A petition for revocation must be served on the franchising authority and contain a statement that service was made. The franchising authority may file an opposition within 30 days of filing of the petition. A reply may be filed within 15 days of filing of the opposition.

(d) While a petition for revocation is pending, and absent grant of a stay, the franchising authority may continue to regulate the basic service rates of its franchisees.

§ 76.915 Change in status of cable operator.

(a) A cable operator that becomes subject to effective competition, may petition the franchising authority for change in its regulatory status. The operator bears the burden of proving the existence of effective competition. Oppositions may be filed within 15 days of public notice of the filing of the petition, and must be served on the operator. Cable operators may reply within 7 days of filing of oppositions.

(b) Franchising authority decisions on petitions for change in status must be made within 30 days after the pleading cycle set forth in paragraph (a) of this section closes. Franchising authorities must notify the Commission within ten days of any decision changing status. Unless the Commission receives an opposition to such change in status, the decision will become final 30 days after adoption by the franchising authority.

(c) After an initial determination of the franchising authority that effective competition exists becomes final, the franchising authority will then cease regulating basic cable service rates, and the Commission's regulatory authority over cable programming services for the system in the franchise area will also cease.

(d) A cable operator and a franchising authority may submit a joint statement that effective competition exists. The joint statement must stipulate which of the three statutory tests for effective competition has been met and explain how the test has been satisfied. These joint statements will become final decisions within

30 days of filing with the Commission, unless challenged by an interested party.

(e) Cable operators denied a change in status by a franchising authority may seek review of that finding at the Commission by filing a petition for revocation.

(f) In cases where a local franchising authority has not been certified to regulate rates, a cable operator may petition the Commission for change in its regulatory status. The time periods in paragraph (a) of this section will apply to oppositions and replies concerning these petitions.

§ 76.916 Petition for recertification.

(a) After its request for certification has been denied or its existing certification has been revoked, a franchising authority wishing to assume jurisdiction to regulate basic service and associated equipment rates must file a "Petition for Recertification" accompanied by a copy of the earlier decision denying or revoking certification.

(b) The petition must:

(1) Meet the requirements set forth in 47 U.S.C. § 543(a)(3);

(2) State that the cable system is not subject to effective competition; and

(3) Contain a clear showing, supported by either objectively verifiable data such as a state statute, or by affidavit, that the reasons for the earlier denial or revocation no longer pertain.

(c) The petition must be served on the cable operator and on any interested party that participated in the proceeding denying or revoking the original certification.

(d) Oppositions may be filed within 15 days after the petition is filed, and must be served on the petitioner. Replies may be filed within seven days of filing of oppositions, and must be served on the opposing party(ies).

§ 76.920 Composition of the basic tier.

Every subscriber of a cable system must subscribe to the basic tier in order to subscribe to any other tier of video programming or to purchase any other video programming.

§ 76.921 Buy-through of other tiers prohibited.

(a) No cable system operator may require the subscription to any tier other than the basic service tier as a condition of subscription

to video programming offered on a per channel or per program charge basis. A cable operator may, however, require the subscription to one or more tiers of cable programming services as a condition of access to one or more tiers of cable programming services.

(b) A cable operator may not discriminate between subscribers to the basic service tier and other subscribers with regard to the rates charged for video programming offered on a per-channel or per-program charge basis.

(c) Prior to October 5, 2002, the provisions of paragraph (a) of this section shall not apply to any cable system that lacks the capacity to offer basic service and all programming distributed on a per channel or per program basis without also providing other intermediate tiers of service:

(1) By controlling subscriber access to nonbasic channels of service through addressable equipment electronically controlled from a central control point or

(2) Through the installation, noninstallation, or removal of frequency filters (traps) at the premises of subscribers without other alteration in system configuration or design and without causing degradation in the technical quality of service provided.

(d) Any retiering of channels or services that is not undertaken in order to accomplish legitimate regulatory, technical, or customer service objectives and that is intended to frustrate or has the effect of frustrating compliance with paragraphs (a) through (c) of this Section is prohibited.

§ 76.922 Rates for the basic service tier and cable programming services Tiers.

(a) Basic and cable programming service tier rates. Basic service tier and cable programming service rates shall be subject to regulation by the Commission and by state and local authorities, as is appropriate, in order to assure that they are in compliance with the requirements of 47 U.S.C. § 543. Rates that are demonstrated, in accordance with these rules, not to exceed the "Initial Permitted Per Channel Charge" or the "Subsequent Permitted Per Channel Charge" as described below, or the equipment charges as specified in § 76.923, will be accepted as in compliance. The maximum monthly charge per subscriber for a tier of regulated programming services offered by a cable system shall consist of a permitted per channel charge multiplied by the number of channels on the tier, plus a charge for franchise fees. The maximum monthly charges for regulated programming services shall not include any charges for equipment or installations. Charges for equipment and installations are to be calculated separately pursuant to § 76.923 of these rules.

(b) Initial permitted per channel charge.

(1) The permitted per channel charge on the initial date of regulation shall be, at the election of the cable operator, either: (1) a charge determined pursuant to a cost-of-service proceeding; or (2) the charge specified in subsection (i), (ii), or (iii) below, as applicable:

(i) if the operator's per channel charge for regulated programming services and equipment in effect on the date of initial regulation is equal to or below the benchmark per channel charge, as adjusted forward for inflation from September 30, 1992 to the date of initial regulation, then the permitted per channel charge shall be the per channel charge in effect on the date of initial regulation, adjusted for equipment.

(ii) if (1) the operator's per channel charge for regulated programming services and equipment in effect on the date of initial regulation is above the benchmark per channel charge, as adjusted forward for inflation from September 30, 1992 to the date of initial regulation, and (2) the operator's per channel charge for regulated programming services and equipment in effect on September 30, 1992 was above the benchmark per channel charge, then the permitted per channel charge is nine-tenths of the per channel charge in effect on September 30, 1992, but no lower than the benchmark per channel charge, additionally adjusted for inflation from September 30, 1992 to the initial date of regulation, for equipment, and for any changes in the number of channels offered on all regulated tiers.

(iii) if (1) the operator's per channel charge for regulated programming services and equipment in effect on the date of initial regulation is above the benchmark per channel charge, as adjusted forward for inflation from September 30, 1992 until the initial date of regulation, and (2) the operator's per channel charge for regulated programming services and equipment in effect on September 30, 1992 was below the benchmark per channel charge, then the permitted per channel charge is the benchmark rate per channel adjusted for inflation from September 30, 1992 to the initial date of regulation, for equipment, and for any changes in the number of channels offered on all regulated tiers.

(2) For purposes of this section, the initial date of regulation for the basic service tier shall be the date on which local notice is given pursuant to § 76.910 of our rules, that the provision of the basic service tier is subject to regulation. For a cable programming services tier, the initial date of regulation shall be the first date on which a complaint on the appropriate form is filed with the Commission concerning rates charged for the cable programming services tier.

(3) For purposes of this section, rates in effect on the initial date of regulation or on September 30, 1992 shall be the rates charged to subscribers for service received on that date.

(c) Subsequent permitted per channel charge. After the initial date of regulation, the permitted per channel charge for regulated programming services shall be, at the election of the cable operator, either: (1) a per channel rate determined pursuant to a cost-of-service showing, or (2) the prior permitted per channel charge previously approved by a regulatory authority, adjusted for inflation and external costs in accordance with the price cap requirements set forth in subsection (d) below.

(d) Price cap requirements.

(1) Inflation adjustments. Permitted per channel charges for regulated programming services may be adjusted periodically on account of inflation. Adjustments to permitted per channel charges on account of inflation shall be based on changes in the Gross National Product Price Index published by the Bureau of Economic Analysis of the United States Department of Commerce.

(2) External costs. Permitted per channel charges for regulated programming services may also be adjusted for changes in external costs measured on a per channel per subscriber basis. To the extent external cost increases are greater or less than the GNP-PI for the relevant period, the per-channel charge will be adjusted accordingly. Per channel charges may not be increased if external costs increase at a rate less than inflation. Permitted per channel charges also shall be decreased on account of external costs to the extent such costs decrease from previous levels.

(i) Categories. External Costs shall consist of costs in the following categories: (1) state and local taxes applicable to provision of cable television service; (2) franchise fees; (3) costs of complying with franchise requirements, including costs of providing public, educational, and governmental access channels as required by the franchising authority; (4) retransmission consent fees; and (5) programming costs.

(ii) The permitted per channel charge for a tier of regulated programming services shall be adjusted on account of programming costs and retransmission consent fees only for programming or broadcast signals offered on that tier.

(iii) The permitted per channel charge shall not be adjusted for costs of retransmission consent fees or changes in those fees incurred prior to October 6, 1994.

(iv) The starting date for adjustments on account of external costs for a tier of regulated programming service shall be the initial date of regulation of the tier or 180 days from the effective date of

these rules, if the initial date of regulation occurs on or after 180 days from the effective date of these rules.

(v) Changes in franchise fees shall not result in an adjustment to permitted per channel charges, but rather shall be calculated separately as part of the maximum monthly charge per subscriber for a tier of regulated programming service.

(vi) Adjustments to permitted per channel charges on account of increases in costs of programming obtained from affiliated programmers, as defined in § 76.901 of the rules, shall be the lesser of actual increases or the previous permitted rate level increased by the amount of inflation.

(vii) Adjustments to permitted per channel charges on account of increases in costs of programming shall be further adjusted to reflect any revenues received by the operator from the programmer.

§ 76.923 Rates for equipment and installation used to receive the basic service tier.

(a) Scope. The equipment regulated under this section consists of all equipment in a subscriber's home that is used to receive the basic service tier, regardless of whether such equipment is additionally used to receive other tiers of regulated programming service and/or unregulated service. Such equipment shall include, but is not limited to:

(1) converter boxes;
(2) remote control units;
(3) connections for additional television receivers; and
(4) other cable home wiring.

Subscriber charges for such equipment shall not exceed charges based on actual costs in accordance with the requirements set forth below.

(b) Unbundling. A cable operator shall establish rates for remote control units, converter boxes, other customer equipment, installation, and additional connections separate from rates for basic tier service. In addition, the rates for such equipment and installations shall be unbundled one from the other.

(c) Equipment basket. A cable operator shall establish an Equipment Basket, which will include all costs associated with providing customer equipment and installation under this section.

(1) Equipment Basket costs shall be limited to the direct and indirect material and labor costs of providing, leasing, installing, repairing, and servicing customer equipment, as determined in accordance with the cost accounting and cost allocation requirements of § 76.924. The Equipment Basket shall not include general

administrative overhead including general marketing expenses. The Equipment Basket shall include a reasonable profit.

(d) Hourly service charge. A cable operator shall establish charges for equipment and installation using the Hourly Service Charge (HSC) methodology. The HSC shall equal the operator's annual Equipment Basket costs, excluding the purchase cost of customer equipment, divided by the total person hours involved in installing, repairing, and servicing customer equipment during the same period. The HSC is calculated according to the following formula:

$$HSC = \frac{EB - CE}{H}$$

Where, EB = annual Equipment Basket Costs; CE = annual purchase cost of all customer equipment; and H = person hours involved in installing and repairing equipment per year. The purchase cost of customer equipment shall include the cable operator's invoice price plus all other costs incurred with respect to the equipment until the time it is provided to the customer.

(e) Installation charges. Installation charges shall be either:

(i) the HSC multiplied by the actual time spent on each individual installation; or

(ii) the HSC multiplied by the average time spent on a specific type of installation.

(f) Remote charges. Monthly charges for rental of a remote control unit shall consist of the average annual unit purchase cost of the type of remote leased, including acquisition price and incidental costs such as sales tax, financing and storage up to the time it is provided to the customer, added to the product of the HSC times the average number of hours annually repairing or servicing a remote, divided by 12 to determine the monthly lease rate for a remote according to the following formula:

$$\text{Monthly Charge} = \frac{UCE + (HSC \times HR)}{12}$$

Where, HR = average hours repair per year; and UCE = average annual unit cost of remote. Separate charges shall be established for each significantly different type of remote control unit.

(g) Other equipment charges. The monthly charges for rental of converter boxes and other customer equipment shall be calculated in the same manner as for remote control units. Separate charges shall be established for each significantly different type of converter box

and each significantly different type of other customer equipment.

(h) Additional connection charges. The costs of installation and monthly use of additional connections shall be recovered as charges associated with the installation and equipment cost categories, and at rate levels determined by the actual cost methodology presented in the foregoing subsections (e), (f), and (g). An operator may recover additional programming costs and the costs of signal boosters on the customers premises, if any, associated with the additional connection as a separate monthly unbundled charge for additional connections.

(i) Charges for equipment sold. A cable operator may sell customer premises equipment to a subscriber. The equipment price shall recover the operator's cost of the equipment, including costs associated with storing and preparing the equipment for sale up to the time it is sold to the customer, plus a reasonable profit. An operator may sell service contracts for the maintenance and repair of equipment sold to subscribers. The charge for a service contract shall be the HSC times the estimated average number of hours for maintenance and repair over the life of the equipment.

(j) Promotions. A cable operator may offer equipment or installation at charges below those determined under subsections (e) - (g), above, as long as those offerings are reasonable in scope in relation to the operator's overall offerings in the Equipment Basket and not unreasonably discriminatory. Operators may not recover the cost of a promotional offering by increasing charges for other Equipment Basket elements, or by increasing programming service rates above the maximum monthly charge per subscriber prescribed by these rules. As part of a general cost-of-service showing, an operator may include the cost of promotions in its general system overhead costs.

(k) Franchise fees. Equipment charges may include a properly allocated portion of franchise fees.

§ 76.924 - Cost accounting and cost allocation requirements.

(a) Applicability. The requirements of this section are applicable to cable operators for which the basic service tier is regulated by local franchising authorities or the Commission, or, with respect to a cable programming services tier, for which a complaint has been filed with the Commission. The requirements of this section are applicable for purposes of rate adjustments on account of external costs and for cost-of-service showings.

(b) Generally accepted accounting principles. Cable operators shall maintain their accounts in accordance with generally accepted accounting principles, except as otherwise directed by the Commission.

(c) Accounts required. Cable operators shall maintain accounts in a manner that will enable identification of appropriate costs and application of the Commission's cost assignment and allocation procedures, to cost categories necessary for rate adjustments due to changes in external costs and for cost-of-service showings. Such categories shall be sufficiently detailed and supported to permit verification and audit against the company's accounting records.

(d) Accounting level. Except to the extent indicated below, cable operators shall aggregate expenses and revenues at either the franchise, system, regional, or company level in a manner consistent with practices of the operator as of April 3, 1992. However, in all events, cable operators shall identify at the franchise level their costs of franchise requirements, franchise fees, local taxes, and local programming.

(e) Cost allocation requirements.

(1) For purposes of establishing expenses at the franchise level, cable operators shall allocate expenses and revenues aggregated at higher levels to the franchise level based on the ratio of the total number of subscribers served at the franchise level to the total number of subscribers served at the higher level.

(2) Except to the extent indicated below, all categories of costs allocated to, or identified at, the franchise level shall be allocated to the basic service tier based on the ratio of channels in the basic tier to the total number of channels offered in the franchise area, including nonregulated and leased commercial access channels. These costs shall be allocated to each tier of cable programming services based on the ratio of channels in that tier to the total number of channels offered in the franchise area.

(3) Costs of programming and retransmission consent fees, however, shall be allocated only to the tier on which the programming or broadcast signal at issue is offered.

(4) Costs of franchise fees shall be allocated among equipment and installations, program service tiers and subscribers in a manner that is most consistent with the methodology of assessment of franchise fees by local authorities.

(5) Costs of public, educational, and governmental access channels carried on the basic tier shall be directly assigned to the basic tier where possible.

(f) Common costs. Expenses which cannot be assigned to any single expense or service category shall be described as common costs. Common costs shall be allocated to expense categories as follows:

(1) Wherever possible, common costs are to be allocated to service cost categories based on direct analysis of the origin of the costs themselves.

(2) When direct analysis is not possible, common costs shall, if possible, be allocated to service cost categories based on an indirect, cost-causative linkage to other costs directly assigned or allocated to the service cost category.

(3) When neither direct nor indirect measures of cost allocation can be found, common costs shall be allocated to each service cost category based on the ratio of all costs directly assigned and attributed to a service cost category over total costs directly assignable and attributable.

(g) Unrelated expenses and revenues. Cable operators shall exclude from cost categories used to develop rates for the provision of regulated cable service, equipment, and leased commercial access, any direct or indirect expenses and revenues not related to the provision of such services. Common costs of providing regulated cable service, equipment, and leased commercial access and unrelated activities shall be allocated between them in accordance with subsection (f).

(h) Part-time channels. In situations where a single channel is divided on a part-time basis and is used to deliver service associated with different tiers or with pay per channel or pay per view service, a reasonable and documented allocation of that channel between services shall be required along with the associated revenues and costs.

§ 76.925 Costs of franchise requirements.

(a) The costs of satisfying franchise requirements to support public, educational, and governmental channels shall consist of the sum of: (1) all per channel costs for the number of channels used to meet franchise requirements for public, educational, and governmental channels; (2) any direct costs of meeting such franchise requirements; and (3) a reasonable allocation of general and administrative overhead.

(b) The costs of satisfying any other requirement under the franchise shall consist of the direct and indirect costs including a reasonable allocation of general and administrative overhead.

§ 76.930 Initiation of review of basic cable service and equipment rates.

(a) A cable operator shall file its schedule of rates for the basic service tier and associated equipment with a franchising authority within 30 days of receiving written notification from the franchising authority that the franchising authority has been

certified by the Commission to regulate rates for the basic service tier.

§ 76.931 Notification of basic tier availability.

A cable operator shall provide written notification to subscribers of the availability of basic tier service by September 19, 1993, or three billing cycles from June 21, 1993, and to new subscribers at the time of installation. This notification shall include the following information:

(1) That basic tier service is available;

(2) The cost per month for basic tier service;

(3) A list of all services included in the basic service tier.

§ 76.932 Notification of proposed rate increase.

A cable operator shall provide written notice to a subscriber of any increase in the price to be charged for the basic service tier or associated equipment at least 30 days before any proposed increase is effective. The notice should include the name and address of the local franchising authority.

§ 76.933 Franchising authority review of basic cable rates and equipment costs.

(a) After a cable operator has submitted for review its existing rates for the basic service tier and associated equipment costs, or a proposed increase in these rates (including increases in the baseline channel change that results from reductions in the number of channels in a tier), the existing rates will remain in effect or the proposed rates will become effective after 30 days from the date of submission; provided, however, that the franchising authority may toll this 30-day deadline for an additional time by issuing a brief written order as described in paragraph (b) within 30 days of the rate submission explaining that it needs additional time to review the rates.

(b) If the franchising authority is unable to determine, based upon the material submitted by the cable operator, that the existing or proposed rates are within the Commission's permitted basic service tier charge or actual cost of equipment as defined in §§ 76.922 and 76.923, or if a cable operator has submitted a cost-of-service showing pursuant to §§ 76.937(c) and 76.924, seeking to justify a rate above the Commission's basic service tier charge as defined in §§ 76.922 and 76.923, the franchising authority may toll the 30-day deadline in paragraph (a) of this section to request and/or consider additional information or to consider the comments from interested parties as follows:

(1) For an additional 90 days in cases not involving cost-of-service showings; or

(2) For an additional 150 days in cases involving cost-of-service showings.

(c) If a franchising authority has availed itself of the additional 90 or 150 days permitted in paragraph (b) of this section, and has taken no action within these additional time periods, then the proposed rates will go into effect at the end of the 90 or 150 day periods, or existing rates will remain in effect at such times, subject to refunds if the franchising authority subsequently issues a written decision disapproving any portion of such rates, provided, however, that in order to order refunds, a franchising authority must have issued a brief written order to the cable operator by the end of the 90 or 150-day period permitted in paragraph (b) of this section directing the operator to keep an accurate account of all amounts received by reason of the rate in issue and on whose behalf such amounts were paid.

§ 76.934 Small systems.

A franchising authority that has been certified, pursuant to § 76.910 to regulate rates for basic service and associated equipment may permit a small system as defined in section 76.901 to certify that the small system's rates for basic service and associated equipment comply with § 76.922, the Commission's substantive rate regulations.

§ 76.935 Participation of interested parties.

In order to regulate basic tier rates or associated equipment costs, a franchising authority must have procedural laws or regulations applicable to rate regulation proceedings that provide a reasonable opportunity for consideration of the views of interested parties. Such rules must take into account the 30, 120, or 180-day time periods that franchising authorities have to review rates under § 76.933.

§ 76.936 Written decision.

(a) A franchising authority must issue a written decision in a ratemaking proceeding whenever it disapproves an initial rate for the basic service tier or associated equipment in whole or in part, disapproves a request for a rate increase in whole or in part, or approves a request for an increase in whole or in part over the objections of interested parties. A franchising authority is not required to issue a written decision that approves an unopposed existing or proposed rate for the basic service tier or associated equipment.

(b) Public notice must be given of any written decision required in paragraph (a), including releasing the text of any written decision to the public.

§ 76.937 Burden of proof.

(a) A cable operator has the burden of proving that its existing or proposed rates for basic service and associated equipment comply with 47 U.S.C. § 543, and §§ 76.922 and 76.923.

(b) For an existing or a proposed rate for basic tier service or associated equipment that is within the permitted tier charge and actual cost of equipment as set forth in §§ 76.922 and 76.923, the cable operator must submit the appropriate FCC form.

(c) For an existing or a proposed rate for basic tier service that exceeds the permitted tier charge as set forth in §§ 76.922 and 76.923, the cable operator must submit a cost-of-service showing to justify the proposed rate.

§ 76.938 Proprietary information.

A franchising authority may require the production of proprietary information to make a rate determination and in such cases must apply procedures analogous to those set forth in § 0.459 regarding requests for confidentiality.

§ 76.940 Prospective rate reduction.

A franchising authority may order a cable operator to implement a reduction in basic service tier or associated equipment rates where necessary to bring rates into compliance with the standards set forth in §§ 76.922 and 76.923.

§ 76.941 Rate prescription.

A franchising authority may prescribe a reasonable rate for the basic service tier or associated equipment after it determines that a proposed rate is unreasonable.

§ 76.942 Refunds.

(a) A franchising authority may order a cable operator to refund to subscribers that portion of previously paid rates determined to be in excess of the permitted tier charge or above the actual cost of equipment, unless the operator has submitted a cost-of-service showing which justifies the rate charged as reasonable. Before ordering a cable operator to refund previously paid rates to subscribers, a franchising authority must give the operator notice and opportunity to comment.

(b) An operator's liability for refunds is limited to a one-year period, except that an operator that fails to comply with a valid rate order issued by a franchising authority or the Commission shall be liable for refunds commencing from the effective date of such order until such time as it complies with such order.

(c) The refund period shall run as follows:

(1) From the date the operator implements a prospective rate reduction back in time to June 21, 1993, or one year, whichever is shorter.

(2) From the date a franchising authority issues an accounting order pursuant to § 76.933(c), and ending on the date the operator implements a prospective rate reduction ordered by a franchising authority or one year, whichever is shorter.

(d) The cable operator, in its discretion, may implement a refund in the following manner:

(1) By returning overcharges to those subscribers who actually paid the overcharges, either through direct payment or as a specifically identified credit to those subscribers' bills; or

(2) By means of a prospective percentage reduction in the rates for the basic service tier or associated equipment to cover the cumulative overcharge. This shall be reflected as a specifically identified, one-time credit on prospective bills to the class of subscribers that currently subscribe to the cable system.

(e) Refunds shall include interest computed at applicable rates published by the Internal Revenue Service for tax refunds and additional tax payments.

§ 76.943 Fines.

(a) A franchising authority may impose fines or monetary forfeitures on a cable operator that does not comply with a rate decision or refund order directed specifically at the cable operator, provided the franchising authority has such power under state or local laws.

(b) A cable operator shall not be subject to forfeiture because its rate for basic service or equipment is determined to be unreasonable.

§ 76.944 Commission review of franchising authority decisions on rates for the basic service tier and associated equipment.

(a) The Commission shall be the sole forum for appeals of decisions by franchising authorities on rates for the basic service tier or associated equipment involving whether or not a franchising

authority has acted consistently with the Cable Act or §§ 76.922 and 76.923. Appeals of ratemaking decisions by franchising authorities that do not depend upon determining whether a franchising authority has acted consistently with the Cable Act or §§ 76.922 and 76.923, may be heard in state or local courts.

(b) Any participant at the franchising authority level in a ratemaking proceeding may file an appeal of the franchising authority's decision with the Commission within 30 days of release of the text of the franchising authority's decision as computed under § 1.4(b) of this chapter. Oppositions may be filed within 15 days after the appeal is filed, and must be served on the party(ies) appealing the rate decision. Replies may be filed 7 days after the last day for oppositions and shall be served on the parties to the proceeding.

§ 76.945 Procedures for Commission review of basic service rates.

(a) Upon assumption of rate regulation authority, the Commission will notify the cable operator and require the cable operator to file its basic rate schedule with the Commission within 30 days, with a copy to the local franchising authority.

(b) Basic service and equipment rate schedule filings for existing rates or proposed rate increases (including increases in the baseline channel change that results from reductions in the number of channels in a tier) must use the appropriate FCC forms. Cable operators with existing or proposed rates above the permitted tier rate must submit a cost-of-service showing sufficient to support a finding that the rates are reasonable.

(c) Filings proposing annual adjustments or rates within the rate regulation standards in §§ 76.922 and 76.923, must be made 30 days prior to the proposed effective date and can become effective on the proposed effective date unless the Commission issues an order deferring the effective date or denying the rate proposal. Petitions opposing such filings must be filed within 15 days of public notice of the filing by the cable operator and be accompanied by a certificate that service was made on the cable operator and the local franchising authority. The cable operator may file an opposition within five days of filing of the petition, certifying to service on both the petitioner and the local franchising authority.

(d) Filings proposing a rate not within the rate regulation standards of §§ 76.922 and 76.923, must be made 90 days before the requested effective date. Petitions opposing such filings must be filed within 30 days of public notice of the filing, and be accompanied by a certificate that service was made on the cable operator and the local franchising authority. The cable operator may file an opposition within 10 days of the filing of the petition, and certifying that service was made on the petitioner and the local franchising authority.

§ 76.950 Complaints regarding cable programming service rates.

Any subscriber, franchising authority, or other relevant state or local government entity may file with the Commission a complaint challenging the reasonableness of a cable operator's rate for cable programming service, or the reasonableness of a cable operator's charges for installation or rental of equipment used for the receipt of cable programming service.

§ 76.951 Standard complaint form; other filing requirements.

(a) Any complaint regarding a cable operator's rate for cable programming service or associated equipment must be filed using standard complaint form, FCC 329. The cable operator must provide a copy of the standard complaint form to any subscriber upon request.

(b) The following information must be provided on the standard complaint form:

(1) The complainant's name, mailing address, and daytime telephone number;

(2) The name, mailing address, and FCC community unit identifier of the relevant cable operator (**Note**: pursuant to § 76.952, the cable operator must provide its FCC community unit identifier on monthly bills to subscribers);

(3) The name and address of the relevant franchising authority (**Note**: pursuant to § 76.952, the cable operator must provide this information on monthly bills to subscribers);

(4) An indication whether the complainant is challenging the reasonableness of:

(i) A rate concerning cable programming service or associated equipment in effect on June 21, 1993; or

(ii) A rate increase for cable programming service or associated equipment;

(5) For subscriber complaints regarding a rate increase, the date the complainant first received a bill from the cable operator reflecting the increased rate;

(6) A description of the cable programming service or associated equipment involved and, if applicable, how the service or associated equipment has changed;

(7) The current rate for the cable programming service or associated equipment at issue and, if the complainant is challenging the reasonableness of a rate increase, the most recent rate for the

service or associated equipment immediately prior to the rate increase;

(8) An indication whether the complainant is filing:

(i) a complaint regarding this specific rate for the first time; or

(ii) a corrected complaint regarding this specific rate to cure a defect in a prior complaint that was dismissed without prejudice;

(9) If the complainant is filing a corrected complaint, an indication of the date the complainant filed the prior complaint and the date the complainant received notification from the Commission that the prior complaint was defective;

(10) A certification that a copy of the complaint, including all attachments, is being served contemporaneously via first class mail on the cable operator and, if the complainant is a subscriber, on the relevant franchising authority;

(11) An allegation that the rate in question is unreasonable because it violates the Commission's rate regulations; and

(12) A certification that, to the best of the complainant's knowledge, the information provided on the form is true and correct.

(c) The complainant must attach to the standard complaint form a copy of the most recent bill reflecting the disputed rate or rate increase.

(d) A complaining subscriber may, but is not required to, attach to the standard complaint form a statement from the relevant franchising authority presenting its views on the reasonableness of the rate in question.

§ 76.952 Information to be provided by cable operator on monthly subscriber bills.

All cable operators must provide the following information to subscribers on monthly bills:

(a) The name and mailing address of the relevant franchising authority; and

(b) The FCC community unit identifier for the cable system.

§ 76.953 Limitation on filing a complaint.

(a) Complaint regarding a rate in effect on June 21, 1993. Notwithstanding paragraph (b) of this section, a complaint regarding

a rate for cable programming service or associated equipment in effect on June 21, 1993 must be filed by December 20, 1993.

(b) Complaint regarding a rate increase. Except as provided in paragraph (a) of this section, a complaint alleging an unreasonable rate for cable programming service or associated equipment may be filed against a cable operator only in the event of a rate increase. A complaint regarding a rate increase for cable programming service or associated equipment must be filed with the Commission within 45 days from the date the complainant receives a bill from the cable operator that reflects the increased rate.

(c) Late-filed complaints will be dismissed with prejudice.

§ 76.954 Initial review of complaint; minimum showing requirement; dismissal of defective complaints.

(a) The Commission will conduct an initial review of a complaint to determine if it meets the minimum showing required to allow the complaint to go forward. The minimum showing shall be satisfied if the complaint is filed using the standard complaint form described in § 76.951 and includes all information and attachments required by that form. A complainant will not be required, as part of the minimum showing, to provide the underlying information and calculations necessary to judge the cable programming service rate in question against the Commission's rate standards.

(b) A complaint that does not meet the minimum showing requirement described in para. (a) of this section will be considered defective. A defective complaint will be dismissed without prejudice to filing a corrected complaint as provided by
§ 76.955. The Commission will notify the complainant by mail of the dismissal. The filing of a complaint on the applicable form, but which is otherwise defective, will toll the limitation period established by § 76.953.

§ 76.955 Additional opportunity to file corrected complaint.

(a) If the Commission dismisses an initial complaint without prejudice pursuant to § 76.954, the complainant shall have one additional opportunity to cure the defect and file a corrected complaint.

(b) For a complaint filed on the applicable form but is otherwise defective, the complainant must cure the defect and file a corrected complaint with the Commission within 30 days from the date of the Commission's dismissal notice. Failure to cure the defect and file a corrected complaint within this time period will result in dismissal of the complaint with prejudice.

§ 76.956 Cable operator response.

(a) Unless the Commission notifies a cable operator to the contrary, the cable operator must file with the Commission a response to a complaint filed on the applicable form, within 30 days of the date of service of the complaint. The response shall indicate when service occurred. Service by mail is complete upon mailing. See § 1.47(f). The response shall include the information required by the appropriate FCC form. The cable operator must serve its response on the complainant (and, if the complainant is a subscriber, the relevant franchising authority) via first class mail.

(b) The burden shall be on the cable operator to prove that the service rate or equipment charge in question is not unreasonable. The cable operator may carry its burden in the following manner:

(1) For a service rate at or below the permitted level, by providing information and calculations that demonstrate that the rate in question falls at or below the permitted level;

(2) For a service rate that exceeds the permitted level;

(i) By providing proof that the cable system has reduced the rate for the cable programming service at issue to a level at or below the permitted level; or

(ii) By providing detailed cost-based information that demonstrates that the rate in question is reasonable despite the fact that it exceeds the permitted level.

(3) For a charge for equipment installation or rental, by providing information that demonstrates that the charge is based on the cable operator's actual cost.

(c) In addition to responding to the merits of a complaint, the cable operator may also move for dismissal of the complaint for failure to meet the minimum showing requirement. Any such motion for dismissal must state with particularity the reasons the cable operator believes the complaint is defective and shall not relieve the cable operator of its obligation to respond to the merits of the complaint.

(d) A cable operator may file a consolidated response to multiple complaints regarding the identical rate or rate increase. A consolidated response must be filed within 30 days from the date of service of the first complaint received, unless the Commission notifies the cable operator to the contrary. A cable operator may amend a consolidated response to address new issues raised by complaints received after the cable operator's initial response.

(e) A cable operator that fails to file and serve a response to a valid complaint may be deemed in default. If the Commission deems

a cable operator in default, the Commission may enter an order against the cable operator finding the rate to be unreasonable and mandating appropriate relief.

(f) A cable operator need not respond to any complaint that is:

(1) Not filed on the applicable form; or

(2) That the Commission has determined is defective and has so notified the cable operator.

§ 76.957 Commission adjudication of the complaint.

The Commission will consider the complaint and the cable operator's response and then determine by written decision whether the rate for the cable programming service or associated equipment is unreasonable or not. If it determines that the rate in question is unreasonable, the Commission will grant the complaint and may order appropriate relief, including, but not limited to, prospective rate reductions and refunds. If it determines that the rate in question is reasonable, the Commission will deny the complaint.

§ 76.960 Prospective rate reductions.

Upon a finding that a rate for cable programming service or associated equipment is unreasonable, the Commission may order the cable operator to implement a prospective rate reduction to the class of customers subscribing to the cable programming service at issue. The Commission's decision regarding a prospective rate reduction shall remain binding on the cable operator for one year unless the Commission specifies otherwise.

§ 76.961 Refunds.

(a) Upon a finding that a rate for cable programming service or associated equipment is unreasonable, the Commission may order the cable operator to refund to subscribers that portion of previously paid rates which is deemed unreasonable.

(b) The cumulative refund due subscribers shall be calculated from the date a valid complaint is filed until the date a cable operator implements a prospective rate reduction as ordered by the Commission pursuant to §76.960.

(c) The cable operator, in its discretion, may implement a refund in the following manner:

(i) By returning overcharges to those subscribers who actually paid the overcharges, either through direct payment or as a specifically identified, one-time credit to those subscribers' bills; or

(ii) By means of a prospective percentage reduction in the unreasonable cable programming service rate or equipment charge to cover the cumulative overcharge. This shall be reflected as a specifically identified, one-time credit on prospective bills to the class of subscribers that currently subscribe to the cable programming service or associated equipment at issue.

(d) Refunds shall include interest computed at applicable rates published by the Internal Revenue Service for tax refunds and additional tax payments. Interest shall accrue from the date a valid complaint is filed until the refund issues.

§ 76.962 Implementation and certification of compliance.

(a) Implementation. A cable operator must implement remedial requirements, including prospective rate reductions and refunds, within 60 days from the date the Commission releases an order mandating a remedy.

(b) Certification of compliance. A cable operator must certify to the Commission its compliance with any Commission order mandating remedial requirements. Such certification shall:

(1) Be filed with the Commission within 90 days from the date the Commission releases an order mandating a remedy;

(2) Reference the applicable Commission order;

(3) State that the cable operator has complied fully with all provisions of the Commission's order;

(4) Include a description of the precise measures the cable operator has taken to implement the remedies ordered by the Commission; and

(5) Be signed by an authorized representative of the cable operator.

§ 76.963 Forfeiture.

(a) If any cable operator willfully fails to comply with the terms of any Commission order, including an order mandating remedial requirements after a finding of unreasonable cable programming service or equipment rates, or any Commission rule, the Commission may, in addition to other remedies, impose a forfeiture pursuant to Section 503(b) of the Communications Act of 1934, as amended, 47 U.S.C. § 503(b).

(b) A cable operator shall not be subject to forfeiture because its rate for cable programming service or equipment is determined to be unreasonable.

§ 76.964 Advance written notification of rate increases.

In addition to the requirement of Section 76.309(c)(3)(i)(B) regarding advance notification to customers of any changes in rates, programming services or channel positions, a cable operator shall give the relevant franchising authority a minimum of 30 days advance written notification of any changes in rates for cable programming service or associated equipment.

§ 76.970 Commercial leased access rates.

(a) Cable operators shall designate channel capacity for commercial use by persons unaffiliated with the operator in accordance with the requirement of 47 U.S.C. § 532.

(b) The maximum commercial leased access rates that a cable operator may charge is the highest implicit net fee charged any nonaffiliated programmer (excluding leased access programmers) within the same program category.

(c) The implicit fee charged an unaffiliated programmer shall be calculated by determining the monthly price per subscriber that the operator pays to carry the programming of nonaffiliated providers and deducting the monthly price subscribers pay to view the programming of the nonaffiliated provider. This difference is multiplied by the percentage of subscribers able to receive the nonaffiliated provider's programming. The implicit fee for a contracted service may not include fees, stated or implied, for services other than the provision of channel capacity (e.g., billing and collection, marketing, or studio services).

(d) For each of the three program categories as defined in para. (f) of this section, the highest implicit net fee charged any nonaffiliated provider in each category shall be the maximum monthly leased access rate per subscriber that the operator could charge a commercial leased access programmer in that category. The highest implicit net fee shall be based on contracts in effect in the previous calendar year. Maximum rates for shorter periods can be calculated by prorating the monthly maximum rate.

(e) Upon request, a schedule of commercial leased access rates shall be provided to prospective leased access programmers. Operators shall maintain, for Commission inspection, sufficient supporting documentation to justify the scheduled rates, including supporting contracts, calculations of the net implicit fees, and justifications for all adjustments.

(f) For purposes of para. (b) of this section there are three program categories:

(1) Programming for which a per-event or per channel charge is made;

(2) Programming more than fifty percent of the capacity of which is used to sell products directly to customers; and

(3) All other programming.

§ 76.971 Commercial leased access terms and conditions.

(a) (1) The cable operator and unaffiliated commercial leased access user may negotiate channel placement and tier access for leased programming, taking into account:

(i) The nature of the service (pay or general distribution channel, complete channel or individual program);

(ii) The relationship between the charge imposed and the desirability of the channel; and

(iii) The need to provide competition in program delivery and to afford users a genuine outlet for their programming.

(2) Where demand for commercial leased access capacity exceeds available supply, each lessee will be allowed to lease up to one channel's capacity.

(b) Cable operators may not apply programming production standards to leased access that are any higher than those applied to public, educational and governmental access channels.

(c) Cable operators are required to provide unaffiliated leased access users the minimal level of technical support necessary for users to present their material on the air, and may not unreasonably refuse to cooperate with a leased access user in order to prevent that provider from obtaining channel capacity, provided however, that leased access providers must reimburse operators for the reasonable cost of any technical support that operators actually provide.

(d) Cable operators may require reasonable security deposits or other assurances from users who are unable to prepay in full for access to leased commercial channels.

(e) Cable operators may not set terms and conditions for commercial leased access use based on content, except:

(1) To the limited extent necessary to establish a reasonable price for the commercial use of designated channel capacity by an unaffiliated person; or

(2) To comply with 47 U.S.C. § 532(h), (j) and § 76.701.

(f) (1) A cable operator shall provide billing and collection services for commercial leased access cable users, unless the

operator demonstrates the existence of third party billing and collection services which in terms of cost and accessibility, offer leased access users an alternative substantially equivalent to that offered comparable non-leased programmers.

(2) If an operator can make the showing required in Para. (f)(1) of this section, it must, to the extent technically feasible, make available data necessary to enable a third party to bill and collect for the leased access user.

§ 76.975 Commercial leased access dispute resolution.

(a) Any person aggrieved by the failure or refusal of a cable operator to make commercial channel capacity available in accordance with the provisions of Title VI of the Communications Act may bring an action in the district court of the United States for the Judicial district in which the cable system is located to compel that such capacity be made available.

(b) Any person aggrieved by the failure or refusal of a cable operator to make commercial channel capacity available or to charge rates for such capacity in accordance with the provisions of Title VI of the Communications Act, or our implementing regulations, §§ 76.970 and 76.971, may file a petition for relief with the Commission.

(c) A petition must contain a concise statement of the facts constituting a violation of the statute or the Commission's Rules, the specific statute(s) or rule(s) violated, and certify that the petition was served on the cable operator.

(d) A petition must be filed within 60 days of the alleged violation.

(e) The cable operator or other respondent will have 30 days from the filing of the petition in which to file a response. If a leased access rate is disputed, the response must show that the rate charged is not higher than the highest implicit fee the operator charges for a comparable category of service, and submit the affidavit of a responsible company official in support. If, after a response is submitted, the staff finds a prima facie violation of our rules, the staff may require a respondent to produce additional information, or specify other procedures necessary for resolution of the proceeding.

(f) The Commission, after consideration of the pleadings, may grant the relief requested, in whole or in part, including, but not limited to ordering refunds, injunctive measures, or forfeitures pursuant 47 U.S.C. § 503, denying the petition, or issuing a ruling on the petition or dispute.

(g) To be afforded relief, the petitioner must show by clear and convincing evidence that the cable operator has violated the Commission's leased access provisions in 47 U.S.C. § 532 or §§ 76.970 and 76.971, or otherwise acted unreasonably or in bad faith in failing or refusing to make capacity available or to charge lawful rates for such capacity to an unaffiliated leased access programmer.

(h) During the pendency of a dispute, a party seeking to lease channel capacity for commercial purposes, shall comply with the rates, terms and conditions prescribed by the cable operator, subject to refund or other appropriate remedy.

§ 76.977 Minority and educational programming used in lieu of deregulated commercial leased access capacity.

(a) A cable operator required by this section to designate channel capacity for commercial use pursuant to 47 U.S.C. § 532, may use any such channel capacity for the provision of programming from a qualified minority programming source or from any qualified educational programming source, whether or not such source is affiliated with cable operator. The channel capacity used to provide programming from a qualified minority programming source or from any qualified educational programming source pursuant to this Section may not exceed 33 percent of the channel capacity designated pursuant to 47 U.S.C. § 532.

(b) For purposes of this section, a qualified minority programming source is a programming source that devotes substantially all of its programming to coverage of minority viewpoints, or to programming directed at members of minority groups, and which is over 50 percent minority-owned.

(c) For purposes of this section, a qualified educational programming source is a programming source that devotes substantially all of its programming to educational or instructional programming that promotes public understanding of mathematics, the sciences, the humanities, or the arts and has a documented annual expenditure on programming exceeding $15 million. The annual expenditure on programming means all annual costs incurred by the programming source to produce or acquire programs which are scheduled to be televised, and specifically excludes marketing, promotion, satellite transmission and operational costs, and general administrative costs.

(d) For purposes of paragraphs (b) and (c) of this section, "substantially all" means that 90% or more of the programming offered must be devoted to minority or educational purposes, as defined in paragraphs (b) and (c) of this section, respectively.

(e) For purposes of subsection (b), "minority" is defined as in 47 U.S.C. 309(i)(3)(c)(ii) to include Blacks, Hispanics, American Indians, Alaska Natives, Asians and Pacific Islanders.

§ 76.980. Charges for customer changes.

(a) This Section shall govern charges for any changes in service tiers or equipment provided to the subscriber that are initiated at the request of a subscriber after initial service installation.

(b) The charge for customer changes in service tiers effected solely by coded entry on a computer terminal or by other similarly simple methods shall be a nominal amount, not exceeding actual costs, as defined in subsection (c) below.

(c) The charge for customer changes in service tiers or equipment that involve more than coded entry on a computer or other similarly simple method shall be based on actual cost. The actual cost charge shall be either the HSC, as defined in Section 76.923 of the rules, multiplied by the number of person hours needed to implement the change, or the HSC multiplied by the average number of person hours involved in implementing customer changes.

(d) A cable operator operator may establish a higher charge for changes effected solely by coded entry on a computer terminal or by other similarly simple methods, subject to approval by the franchising authority, for a subscriber changing service tiers more than two times in a twelve month period, except for such changes ordered in response to a change in price or channel line-up. If a cable system adopts such an increased charge, the cable system must notify all subscribers in writing that they may be subject to such a charge for changing service tiers more than the specified number of times in any twelve month period.

(e) Downgrade charges that are the same as, or lower than, upgrade charges are evidence of the reasonableness of such downgrade charges.

(f) For 30 days after notice of retiering or rate increases, a customer may obtain changes in service tiers at no additional charge.

§ 76.981 Negative option billing.

A cable operator shall not charge a subscriber for any service or equipment that the subscriber has not affirmatively requested by name. This provision, however, shall not preclude the addition or deletion of a specific program from a service offering, the addition or deletion of specific channels from an existing tier of service, or the restructuring or division of existing tiers of service that do not result in a fundamental change in the nature of an existing service or tier of service provided that such change is otherwise consistent with applicable regulations. A subscriber's failure to refuse a cable operator's proposal to provide such service or equipment is not an affirmative request for service or equipment. A subscriber's affirmative request for service or equipment may be made orally or in writing.

§ 76.982 Continuation of rate agreements.

During the term of an agreement executed before July 1, 1990, by a franchising authority and a cable operator providing for the regulation of basic cable service rates, where there was not effective competition under Commission rules in effect on that date, the franchising authority may regulate basic cable rates without following Section 623 of the 1992 Cable Act or §§ 76.910 through 76.942. A franchising authority regulating basic cable rates pursuant to such a rate agreement is not required to file for certification during the remaining term of the agreement but shall notify the Commission of its intent to continue regulating basic cable rates.

§ 76.983 Discrimination.

(a) No Federal agency, state, or local franchising authority may prohibit a cable operator from offering reasonable discounts to senior citizens or to economically disadvantaged groups.

(1) Such discounts must be offered equally to all subscribers in the franchise area who qualify as members of these categories, or any reasonable subcategory thereof.

(2) For purposes of this section, members of economically disadvantaged groups are those individuals who receive federal, state or local welfare assistance.

(b) Nothing herein shall preclude any Federal agency, state, or local franchising authority from requiring and regulating the reception of cable service by hearing impaired individuals.

§ 76.984 - Geographically uniform rate structure.

(a) The rates charged by cable operators subject to §§ 76.922 and 76.923 shall be provided pursuant to a rate structure that is uniform throughout each franchise area in which cable service is provided.

(b) This section does not prohibit the establishment by cable operators of reasonable categories of service and customers with separate rates and terms and conditions of service, within a franchise area.

§ 76.985 Subscriber bill itemization.

(a) Cable operators may identify as a separate line item of each regular subscriber bill the following:

(1) The amount of the total bill assessed as a franchise fee and the identity of the franchising authority to which the fee is paid.

(2) The amount of the total bill assessed to satisfy any requirements imposed on the cable operator by the franchise agreement to support public, educational, or governmental channels or the use of such channels.

(3) The amount of any other fee, tax, assessment, or charge of any kind imposed by any governmental authority on the transaction between the operator and the subscriber. In order for a governmental fee or assessment to be separately identified under this subsection, it must be directly imposed by a governmental body on a transaction between a subscriber and an operator.

(b) The charge identified on the subscriber bill as the total charge for cable service should include all fees and costs itemized pursuant to this Section.

(c) Local franchising authorities may adopt regulations consistent with this section.

APPENDIX D -- FORMS

CERTIFICATION FORM FOR LOCAL FRANCHISING AUTHORITIES

FCC FORM 328

APPENDIX D

SAMPLE FORM ONLY—NOT APPROVED BY OMB

FORM FOR LOCAL FRANCHISING AUTHORITY CERTIFICATION

FCC Form 328

APPROVED OMB _____
Expires _____

FEDERAL COMMUNICATIONS COMMISSION
WASHINGTON, D.C. 20554

CERTIFICATION OF FRANCHISING AUTHORITY TO REGULATE BASIC CABLE SERVICE RATES AND INITIAL FINDING OF LACK OF EFFECTIVE COMPETITION

Return form to the Federal Communications Commission

(Under 47 C.F.R. § 76.1000 et seq.)

1. a) Name of Franchising Authority: _____
   b) Address: _____
   (including zip) _____
   c) Telephone: _____

2. a) Name(s) and address(es) including zip code of cable system(s) and associated FCC community unit identifiers within your jurisdiction.
   _____
   _____
   _____
   _____

   b) Name(s) of system(s) and associated community unit identifiers you claim are subject to regulation.
   _____
   _____

   c) Have you served a copy of this form on all parties listed in b?
   Yes__ No__

3. Will your franchising authority adopt (within 120 days of certification) and administer regulations with respect to basic cable service that are consistent with the regulations adopted by the FCC pursuant to 47 U.S.C. § 543(b)?
   Yes__ No__

4. With respect to the franchising authority's regulations referred to in Question 3,
   a) Does your franchising authority have the legal authority to adopt them?

      Yes__ No__

   b) Does your franchising authority have the personnel to administer them?

      Yes__ No__

5. Do the procedural laws and regulations applicable to rate regulation proceedings by your franchising authority provide a reasonable opportunity for consideration of the views of interested parties?

   Yes__ No__

6. The Commission presumes that the cable system(s) listed in 2b is (are) not subject to effective competition. Based on the definition below, do you have reason to believe that this presumption is correct? If not, state why not.

   (Effective competition means that (a) fewer than 30 percent of the households in the franchise area subscribe to the cable service of a cable system; (b) the franchise area is (i) served by at least two unaffiliated multichannel video programming distributors each of which offers comparable video programming to at least 50 percent of the households in the franchise area; and (ii) the number of households subscribing to programming services offered by multichannel video programming distributors other than the largest multichannel video programming distributor exceeds 15 percent of the households in the franchise area; or (c) a multichannel video programming distributor operated by the franchising authority for that franchise area offers video programming to at least 50 percent of the households in that franchise area.)

   Yes__ No__

   _____
   _____
   _____

SAMPLE FORM ONLY—NOT APPROVED BY OMB

Return this certification form (as indicated in Instructions), along with any attachments, to:

Federal Communications Commission
Attention: Cable Franchising Authority Certification
1919 M Street, N.W.
Washington, D.C. 20554

Hand-delivered forms should be directed to:

Office of the Secretary
Federal Communications Commission
1919 M Street, N.W.
Room 222
Washington, D.C. 20554

SAMPLE FORM ONLY—NOT APPROVED BY OMB

FEDERAL COMMUNICATIONS COMMISSION
WASHINGTON, D.C. 20554

INSTRUCTIONS FOR COMPLETING FCC FORM 328 (FRANCHISING AUTHORITY CERTIFICATION)

1. The Cable Television Consumer Protection and Competition Act, enacted in October 1992, changes the manner in which cable television systems that are not subject to effective competition are regulated. In general, basic cable service rates (the tier required as a condition of access to all other video services and containing, among other services, local broadcast station signals and public, educational, and public access channels) and associated equipment will be subject to regulation by local or state governments ("franchising authorities"). Rates for cable programming service and associated equipment (all services except basic and pay channels) will be subject to regulation by the FCC. Rates for pay channels (channels for which there is a specific per-channel or per-program charge) are not regulated.

2. Only cable systems that are not subject to effective competition may be regulated. Effective competition means that (a) fewer than 30 percent of the households in the franchise area subscribe to the cable service of a cable system; (b) the franchise area is (i) served by at least two unaffiliated multichannel video programming distributors each of which offers comparable video programming to at least 50 percent of the households in the franchise area; and (ii) the number of households subscribing to programming services offered by multichannel video programming distributors other than the largest multichannel video programming distributor exceeds 15 percent of the households in the franchise area; or (c) a multichannel video programming distributor operated by the franchising authority for that franchise area offers video programming to at least 50 percent of the households in that franchise area.)

3. In order to regulate basic cable service rates, a franchising authority must be certified by the FCC. In order to be certified, a franchising authority must complete the form. The completed form must be returned to the FCC in one of two ways: 1) by registered mail, return receipt requested, to the FCC at the address on the form; or 2) by hand delivery, to the room number at the address on the form. If sent by hand delivery, an extra copy must accompany that form so that the Commission's Secretary can stamp the date on that copy.

4. A copy of the form must be served on the cable operator by first-class mail on or before the date the form is sent or delivered to the FCC.

5. The franchising authority's certification will become effective 30 days after the date stamped on the postal return receipt or date stamped on the extra copy, unless otherwise notified by that date. The franchising authority cannot begin to regulate rates, however, until it has actually adopted the required regulations (see below) and until it has notified the

cable operator that it has been certified and that it has adopted the required regulations.

6. In order to be certified, franchising authorities must answer "yes" to Questions 3, 4, and 5, which are explained as follows:

7. Question 3: The franchising authority must adopt regulations consistent with the Commission's regulations for basic cable service. To fulfill this requirement for certification, the franchising authority may simply adopt a regulation indicating that it will follow the regulations established by the FCC.

   The franchising authority has 120 days to adopt these regulations after the time it is certified. The franchising authority may not, however, begin to regulate cable rates until after it has adopted these regulations and until it has notified the cable operator that it has been certified and has adopted the required regulations.

8. Question 4(a): The franchising authority's "legal authority" to regulate basic service must come from state law. In some states, only the state government may regulate cable rates. In those states, the state government should file this certification. Provisions in franchise agreements that prohibit rate regulation are void.

   Question 4(b): The franchising authority must have a sufficient number of personnel to undertake rate regulation.

   If a franchising authority cannot answer "yes" to Question 4(a) or Question 4(b), it should send a letter to the FCC indicating the nature of the problem. In some circumstances, the FCC will step in to regulate basic cable rates in that franchising area. See the Report and Order in this proceeding, _____ FR _____, for a more detailed discussion of these circumstances.

9. Question 5: Franchising authorities must have procedural regulations allowing for public participation in rate regulation proceedings. If a franchising authority does not have these regulations already in place, it must adopt them within 120 days of certification and before it may undertake rate regulation.

10. Question 6: Most cable systems are not subject to effective competition, as defined by the Cable Act. (The definition is included above and on the form.) The franchising authority may presume that the cable system in its jurisdiction is not subject to effective competition. If the franchising authority has reason to believe that this presumption is correct, it should indicate on that form why it believes its cable system does not face effective competition.

    For purposes of applying the definition of effective competition (see Item 2 above), "multichannel video programming distributors" include a cable operator, a multichannel multipoint distribution service, a direct broadcast satellite service, a television receive-only satellite program

distributor, a video dialtone service, and a satellite master antenna television system. A multichannel video programming distributor's services will be deemed "offered" when they are both technically and actually available. Service is "technically available" when the multichannel distributor is physically able to deliver the service to a household wishing to subscribe, with only minimal additional investment by the distributor. A service is "actually available" if subscribers in the franchise area are reasonably aware through marketing efforts that the service is available. Subscribership of those multichannel video programming distributors offering service to at least 50 percent of the households in a franchise area will be aggregated to determine whether at least 15 percent of the households in the franchise area are served by competitors. A multichannel video programming distributor must offer at least 12 channels of programming, at least one channel of which is nonbroadcast, to be found to offer "comparable" video programming.

[A summary of the franchising authority certification process is available from the FCC Office of Public Affairs, Consumer Assistance and Small Business Division, 1919 M Street, N.W., Room 254, Washington, D.C. 20554; (202) 632-7260.]

CABLE PROGRAMMING SERVICES COMPLAINT FORM

FCC FORM 329

SAMPLE FORM ONLY -- NOT APPROVED BY OMB

Federal Communications Commission
Washington, D.C. 20554

Approved by OMB
[OMB number]
Expires _____

FCC 329
CABLE PROGRAMMING SERVICE RATE COMPLAINT FORM

(Carefully read instructions before filling out form)

Complainant's Name _____
Mailing Address _____
City, State, Zip Code _____
Daytime Telephone No. (include area code) _____

Cable Operator's Name _____
Mailing Address _____
City, State, Zip Code _____
Cable Operator's FCC Community Unit Identifier _____

Local Franchising Authority's Name _____
Mailing Address _____
City, State, Zip Code _____

If you are a subscriber, you must attach a copy of your current bill reflecting the rate or rate increase about which you are complaining. **(NOTE: failure to attach a copy of your current bill reflecting the rate or rate increase may result in dismissal of your complaint.)**

I have attached a copy of my current bill,
dated _____ (month), _____ (year). Yes ____ No ____

Indicate whether you are challenging the reasonableness of: (1) a rate concerning cable programming service or associated equipment in effect on June 21, 1993; or (2) a rate increase. (See the instructions for different filing deadlines depending on which type of complaint you are filing.)

(check one) Rate in effect on June 21, 1993 ____
Rate Increase ____

If you are a subscriber challenging the reasonableness of a rate increase, indicate the date you first received a bill from the cable operator reflecting the rate increase about which you are complaining _____.

Optional: If you are a subscriber challenging the reasonableness of a rate increase, attach a copy of a previous bill (if available) reflecting the rate immediately prior to the rate increase.

I have attached a copy of my previous bill,
dated _____ (month), _____ (year). Yes ___ No ___

In the space below, describe briefly the cable programming service or associated equipment involved and, if applicable, how it has changed. If this space is insufficient, include any additional comments on a separate page attached to this form.

List all channels included in the service _____
_____
_____
_____
_____
_____
_____
_____

List channels (if any) deleted from the service _____
_____
_____

List channels (if any) added to the service _____
_____
_____

Indicate the current rate for the cable programming service or associated equipment and, if you are challenging the reasonableness of a rate increase, the most recent rate in effect immediately prior to the rate increase.

Current Rate: _____ _____ (month), _____ (year)

Previous Rate: _____ _____ (month), _____ (year)

SAMPLE FORM ONLY -- NOT APPROVED BY OMB

Indicate whether this is the first time you have filed a complaint with the FCC or whether you are filing a corrected complaint to cure a defect in a prior complaint.

(check one) First time complaint ____
Corrected complaint ____

If you are filing a corrected complaint to cure a defect in a prior complaint, indicate the date the prior complaint was filed and the date you received notification from the FCC that the prior complaint was defective.

Date prior complaint was filed: _____

Date you received FCC notification
that the prior complaint was defective: _____

I certify that I am sending a copy of this complaint, including all attachments, to the cable operator and the local franchising authority at the addresses listed above via first class mail, postage prepaid, at the same time I am sending this complaint to the FCC. Yes ___ No ___ _____
(Date sent)

(NOTE: Failure to satisfy this requirement may result in dismissal of your complaint. The cable operator will not be required to respond unless you serve the complaint on the cable operator by mail.)

☐ I believe that the cable operator's rate for the cable programming service or associated equipment described above is unreasonable because it violates the FCC's rate regulations. (check the box)

I certify that, to the best of my knowledge, the information supplied on this form is true and correct.

_____ _____
Signature Date

SAMPLE FORM ONLY -- NOT APPROVED BY OMB

This complaint form is in three parts. Once you complete the form you should mail the individual copies, including copies of all attachments, to the following:

Original: Federal Communications Commission
Attn: Cable Programming Service Rate Complaint
1919 M Street, N.W.
Washington, D.C. 20554

Part 2: The cable operator (note: this address should appear on the front or back of your monthly cable bill)

Part 3: The local franchising authority (note: the name and address of the local franchising authority should appear on the front or back of your monthly cable bill)

Please be sure to send all three copies to the correct addresses. If you do not, we may not be able to process your complaint.

(Note to complainant: This complaint form will be maintained in the FCC's records under the cable operator's name. It will not be filed under your name.)

FCC USE ONLY: Revised complaint _____. Date form sent to complainant _____.

SAMPLE FORM ONLY -- NOT APPROVED BY OMB

Federal Communications Commission
Washington, D.C. 20554

Approved by OMB
[omb number]
Expires _____

INSTRUCTIONS FOR FCC 329
CABLE PROGRAMMING SERVICE RATE COMPLAINT FORM

1. This FCC form is to be used by subscribers, franchising authorities, and other relevant state or local government entities seeking to file a complaint with the FCC challenging the reasonableness of a cable operator's rates for cable programming service or for installation or rental of equipment used to receive cable programming service.

2. The term "cable programming service" includes all video programming provided by a cable operator except: (1) programming provided on the basic service tier; or (2) programming provided on a pay-per-channel or pay-per-program basis.

3. The "basic service tier" is the tier that includes your domestic television broadcast signals and public, educational and governmental channels. Under federal law, in most instances, your local franchising authority rather than the FCC regulates rates for the basic service tier and associated equipment. Therefore, if you believe that your rate for the basic service tier or associated equipment is unreasonable, you should contact your local franchising authority to determine if it is authorized to regulate basic service tier rates.

4. Under federal law, video programming provided on a pay-per-channel or pay-per-program basis (for example, a premium movie channel such as HBO or a pay-per-view sports event) is not subject to rate regulation by eitner the FCC or your local franchising authority.

5. If you are concerned about your rates for cable programming service or associated equipment, then you may fill out this form and submit it to the FCC. The FCC will examine the reasonableness of your cable programming service rate according to a specific formula. If the rate the cable operator currently is charging you for the cable programming service is greater than the rate produced by the FCC's formula, the cable operator's rate will be presumed unreasonable. In these circumstances, unless the cable operator can provide cost information to justify the reasonableness of its rate, the FCC may order a refund and/or a prospective rate reduction for the cable programming service at issue.

6. In addition to the cable operator's name and mailing address, you must provide the cable operator's "FCC Community Unit Identifier." (The FCC Community Unit Identifier is a number assigned to each cable system by the FCC for administrative purposes.) Also, you must provide the name and mailing address of the local franchising authority. (The local franchising authority is the local municipal, county or other government organization that regulates cable television in your community.) FCC rules require the cable operator to furnish all this information to you on your monthly bill. If this information does not appear either on the front or back of your monthly bill, contact your cable operator, your local franchising authority, or your local government to obtain the necessary information before filling out this form.

7. If you are a subscriber, you must attach a copy of your monthly cable bill reflecting the rate or rate increase about which you are complaining. If you are challenging the reasonableness of a rate concerning cable programming service or associated equipment in effect on June 21, 1993, the bill should reflect that rate. If you are challenging the reasonableness of a rate increase, the bill should reflect the increased rate. (If you are challenging the reasonableness of a rate increase and have a previous bill which reflects the rate immediately prior to the increase, please attach a copy of the previous bill -- note, however, that this is optional.)

8. You must indicate whether you are challenging the reasonableness of: (1) a rate concerning cable programming service or associated equipment in effect on June 21, 1993; or (2) a rate increase. Except for a limited opportunity to challenge existing rates in effect on June 21, 1993, complaints may be filed only in the event of a rate increase.

9. Please note the following time limitations for filing a complaint:

   - If you are challenging the reasonableness of a rate increase for cable programming service or associated equipment, you must file your complaint with the FCC within 45 days from the date you receive a bill from your cable operator reflecting the rate increase. (Note: deletion of channels may constitute an effective rate increase even though the existing rate for the cable programming service remains unchanged.)

- The only exception to the 45 day time limitation concerns cable programming service and associated equipment rates in effect when the FCC's rules become effective -- that is, June 21, 1993. You may challenge the reasonableness of such rates, but you must file your complaint within 180 days from June 21, 1993 -- that is, by December 18, 1993.

- After December 18, 1993, you may only file complaints about rate increases and you must follow the general 45-day filing requirement described above.

- Late-filed complaints will be dismissed with no opportunity to refile.

10. You must check the box stating your belief that the cable programming service rate violates the FCC's rate regulations. The FCC staff will apply the formula mentioned in paragraph 5 to determine whether the cable operator's rate is presumed reasonable or not -- you do not need to make this calculation.

11. You must fill in all information required by this form. If you fail to fill in all the information on this form, or to attach a copy of your current bill, you will be given one additional opportunity to correct the defect and file a valid complaint. The FCC staff will return your complaint with a blank complaint form, a copy of these instructions, and an informational letter describing why your original complaint was defective. You will have thirty days from the date of the FCC's notice to file a corrected complaint with the FCC. You must indicate on the form that you are filing a corrected complaint, and also indicate the date your prior complaint was filed and the date you received notification from the FCC that your prior complaint was defective. If you do not correct the defect and revise your complaint accordingly, or if the FCC receives your corrected complaint after the additional thirty day period has expired, your complaint will be dismissed with no opportunity to refile.

12. You may attach a statement from your local franchising authority describing its views on the reasonableness of the cable programming service rate in question. This is not a requirement. If you do attach such a statement, you should also mail a copy of it to the cable operator.

13. This complaint form is in three parts. Once you complete the form you must mail the individual copies, including copies of all attachments, to the following:

    Original: Federal Communications Commission
    Attn: Cable Programming Service Rate Complaint
    1919 M Street, N.W.
    Washington, D.C. 20554

    Part 2: The cable operator (at the address listed on your complaint)

    Part 3: The local franchising authority (at the address listed on your complaint)

    Please be sure to send all three copies to the correct address. If you do not, we may not be able to process your complaint.

14. **NOTE: If you do not mail Part 2 of this form, including all attachments, to the cable operator at the same time you mail your complaint to the FCC, the cable operator will not be required to respond and your complaint may be dismissed.**

15. If your complaint meets the requirements listed above, the FCC will require the cable operator to respond to your complaint within thirty days and provide a justification for the reasonableness of your rate. The cable operator must provide you with a copy of its response to the FCC.

16. The FCC staff will examine your complaint and the cable operator's response and then rule on the reasonableness of the cable programming service rate. This ruling will be in writing, and you will receive a copy by mail. If the FCC staff determines that the rate in question is unreasonable, it may order refunds and/or prospective rate reductions. If it determines that the rate in question is reasonable, the FCC staff will deny the complaint.

DETERMINATION OF MAXIMUM INITIAL PERMITTED RATES
FOR REGULATED CABLE SERVICES AND ACTUAL COST OF EQUIPMENT

FCC FORM 393

SAMPLE FORM ONLY--NOT APPROVED BY OMB

FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

GENERAL INSTRUCTIONS FOR COMPLETING FCC FORM 393 (DETERMINATION OF MAXIMUM INITIAL PERMITTED RATES FOR REGULATED CABLE SERVICES AND ACTUAL COST OF REGULATED EQUIPMENT)

1. Cable operators should use this form to calculate (1) rates for existing basic service or equipment requiring approval by local franchising authorities or the FCC, and (2) rates for cable programming service or equipment that are the subject of a complaint filed with the FCC. This form will determine whether your rates for basic service and cable programming service are reasonable under FCC regulations, 47 C.F.R. §§ 76.1000 et seq.

> **NOTE**: After your initial rate for basic service has been approved by the government, you must submit the RATE INCREASE FORM or a cost-of-service showing if you wish to subsequently increase your basic service rates. If the Commission found your cable programming service rates to be unreasonable less than one year ago and you now wish to increase your rates, you must submit the RATE INCREASE FORM or a cost-of-service showing to the Commission for its approval before raising your rates. In addition, if there was no such Commission decision and you raise your cable programming service rates while a complaint about those rates is pending, you must inform the FCC of the rate increase and submit a revised version of this form analyzing the new, higher rates under the FCC's rate standards.

2. This form should be filed with the local franchising authority, or with the FCC in situations where the FCC has assumed jurisdiction to regulate rates for basic service and associated equipment, in order to obtain approval of your existing rates for basic service and associated equipment. It should also be filed with the FCC when you are required to respond to a subscriber's complaint regarding the rate for cable programming service and associated equipment.

3. If, after completing these calculations, you determine that your existing service rate is above the maximum permitted rate, and you do not wish to lower your rate to that level, you must submit a detailed cost-of-service showing justifying the higher rate.

Equipment rates must be based on actual cost, as determined in the equipment sections, Part III of the form.

4. The basic service tier is the tier which includes the broadcast signals you carry (except for superstations) along with public, educational and government access channels that are required by the local franchising authority to be carried on the basic tier. You may include additional services on this tier. Equipment used to receive the basic service tier includes remotes, converter boxes, home wiring and wiring for additional connections.

5. Cable programming service consists of all video programming distributed over a cable system that is not included in the basic service tier or offered on a per-channel or per-program basis. Equipment associated with cable programming service, if any, consists of equipment used exclusively to receive such services; this equipment must not be used to receive the basic tier.

6. This form consists of three parts. Part I is the Cover Sheet, where you should fill in the information derived from Parts II and III. Part II will enable you to determine your maximum permitted rate for the basic service tier or cable programming service, depending on the service for which you are filing. If your rates exceed the permitted levels calculated in this form, you must submit a separate cost-of-service showing or reduce your rates to the permitted level. Part III will enable you to determine your actual costs for equipment used by subscribers to receive regulated programming services. The 1992 Cable Act requires that you charge no more than actual cost for this equipment.

7. Part II contains five worksheets. Worksheet 1 (Calculation of Rates in Effect on Initial Date of Regulation and Benchmark Comparison) allows you to compare your current per-channel rate to the Commission's benchmark. The benchmark is the rate that a cable system with the same number of subscribers, same number of channels, and same number of satellite channels as your system and that is subject to competition would charge. If your current per-channel rate exceeds the benchmark, you must then come into compliance with the benchmark, which is based on rates as of September 30, 1992. You must therefore complete Worksheet 2 (Calculation of Rates in Effect on September 30, 1992 and Benchmark Comparison). This worksheet will require you to reduce your rate to the benchmark or to 90% of your September 30, 1992 per-channel rate, whichever rate is greater. Both Worksheets 1 and 2 allow you to calculate the per-channel rate you can legally charge by a process that weighs the number of channels on each tier and the price for each tier by the number of subscribers to each tier.

8. Worksheet 3, then, deducts equipment revenues per subscriber from the per channel rate derived in Worksheets 1 and 2. The benchmark number does not separately account for profits from equipment, and the 1992 Cable Act prohibits you from charging more

than your costs for equipment. Thus, you must adjust your permitted per-channel rate (calculated in Worksheets 1 and 2) by deducting equipment costs and charging for equipment costs separately.

9. If you calculated your rate from Worksheet 2, you must complete Worksheet 4, which will increase the rate you may charge in order to account for inflation.

10. Worksheet 5 must be completed if the number of regulated channels (that is, basic service channels and cable programming service channels) you currently offer is different from the number of channels used to calculate your Baseline Regulated Rate on either Worksheet 1 or Worksheet 2. If the number of regulated channels you now offer is the same as those you entered on Worksheet 1 or Worksheet 2, you do not need to complete Worksheet 5.

11. You should use Part III of this form to calculate rates for equipment and installation associated with receiving basic cable service or cable programming services. Equipment used to receive a basic tier of service includes (but is not limited to) converter boxes, remote controls, connections for additional television sets, and cable home wiring. Equipment associated with cable programming service is equipment other than that which is used to receive basic cable service. Rates for both basic service and cable programming service equipment and for installations must be based on actual cost and must be unbundled from service rates. In addition, charges for individual items of equipment, as well as charges for installation and additional outlets, must be unbundled one from the other, and charges for different models of the same type of equipment must also be separated.

12. In Part III, you must calculate an Equipment Basket (Worksheet 7) for either basic service or cable programming service equipment, depending on which service you are filing for. Use of this Equipment Basket will enable you to set your equipment rates so that they are based on actual cost, plus a reasonable profit, as mandated by the 1992 Cable Act.

FCC FORM 393 -- PART I

REQUEST FOR RATE APPROVAL
COVER SHEET

*** SAMPLE FORM ONLY -- NOT APPROVED BY OMB ***

FCC FORM 393 -- PART I

REQUEST FOR CABLE RATE APPROVAL
COVER SHEET

FCC Form 393

Approved by OMB ____
Expires ____

Date: _____

Name of Cable Operator: _____

Mailing Address: _____
w/ZIP Code

_____

Community Unit Identification Number: _____

Name of person to contact with
respect to this form: _____

Telephone: ( ) _____

Fax number: ( ) _____

Franchising Authority: _____

Mailing Address: _____
w/ZIP Code

_____

Is this form being filed with respect to:

basic service rate regulation _____?
or cable programming service rate regulation _____?

If this form is being filed in response to a complaint about your cable programming service rates, please attach a copy of the complaint to this cover sheet.

The following sections are to be completed after you have filled out the worksheets in Parts II and III and calculated your actual and permitted rates.

FOR BASIC SERVICE TIER AND EQUIPMENT RATES:

Program Service Rate

(1) Number of channels on basic service tier: ____

(2) Monthly franchise fee per subscriber for basic service tier: $____

(3) Current rate for basic service tier: (include monthly franchise fee per subscriber from (2) above if not already included) $____

(4) Current basic service per channel rate: (divide (3) by (1), above) $____

(5) Maximum permitted per channel rate: (from Line 600 on Worksheet 6) $____

(6) Maximum permitted rate for basic service tier: (multiply (1) by (5) and add (2), above) $____

Note: If your current rate for the basic service tier (entry 2) exceeds the maximum permitted rate for that tier (entry 5), you must submit a cost-of-service showing or your basic service rate will be reduced to the maximum permitted level.

Equipment and Installation Rates

Note: Your equipment and installation rates for the basic service tier must not be included in your program service rate for that tier, but rather must be completely unbundled. In addition, those equipment and installation rates must not exceed your actual costs, plus a reasonable profit. The method for unbundling your equipment and installation rates from the basic service programming rate (if necessary), and for determining your permitted equipment and installation rates, is prescribed in Part II (unbundling) and Part III (rate-setting) of this form. Enter in the spaces below the rate figures you have calculated in Part III of this form, plus the franchise fees you must pay on each of those charges. Your actual basic service equipment and installation charges may not exceed these rates, although they may be lower.

(1) Charge(s) for basic service installations* (from Lines 6 or 7 of Equipment and Installation Worksheet)(**Note:** include appropriate franchise fee):

	Permitted	Actual
(a) Hourly rate	$____	$____
OR		
(b) Average installation charges:		
1. Installation of unwired homes	$____	$____
2. Installation of prewired homes	$____	$____
3. Installation of additional connection at time of initial installation	$____	$____
4. Installation of additional connections requiring separate installation	$____	$____
5. Other installations (specify)	$____	$____

(2) Charge for changing tiers (if any) (from Line 29, 30 or 31 of Equipment and Installation Worksheet)(**Note:** include apprpriate franchise fee):

Permitted	Actual
$____	$____

(3) Monthly charge for lease of remote controls (from Line 14 in Equipment and Installation Worksheet)(**Note:** include appropriate franchise fee):

	Permitted	Actual
Remote control type 1:	$____	$____
Remote control type 2:	$____	$____
Remote control type 3:	$____	$____

---

* If you have further charges for additional connections beyond those reflected in your installation charge, attach a sheet explaining your calculations and setting forth those additional charges. See Note to Equipment and Installation Worksheet Instructions in Part III of this form.

(4) Monthly charge for lease of converter boxes (from Line 21 in Equipment and Installation Worksheet)(**Note:** include appropriate franchise fee):

	Permitted	Actual
Converter box type 1:	$____	$____
Converter box type 2:	$____	$____
Converter box type 3:	$____	$____

(5) Monthly charge for lease of other equipment (from Line 28 in Equipment and Installation Worksheet)(**Note:** include appropriate franchise fee):

	Permitted	Actual
Cable home wiring:	$____	$____
Other equipment (specify):	$____	$____

FOR CABLE PROGRAMMING SERVICE RATES AND EQUIPMENT:

Program Service Rate

Note: If you have more than one cable programming service tier, attach additional sheets with the following information for each tier.

(1) Number of channels on cable programming service tier: ____

(2) Monthly franchise fee per subscriber for cable programming service tier: $____

(3) Current rate for cable programming service tier: $____
(include monthly franchise fee for this tier from (2) above if not already included)

(4) Current cable programming service per channel rate: $____
(divide (1) by (3), above)

(5) Maximum permitted per channel rate: $____
(from Line 600 on Worksheet 6)

(6) Maximum permitted rate for cable programming service tier (multiply (1) by (4) and add (2), above): $____

Note: If your current rate for cable programming services (entry 3) exceeds the maximum permitted rate (entry 6), you must submit a cost-of-service showing or your cable programming service rate will be reduced to the maximum permitted level.

Equipment and Installation Rates

Note: If equipment used for cable programming service is also used to receive the basic tier, then it must be included in basic service equipment. Similarly, if an installation involving cable programming services also involves the basic service tier, it must be included in basic service installations. We anticipate that virtually all equipment and installations will involve the basic service tier and there will thus be no need to complete this part of the cover sheet. However, if you lease equipment and/or provide some installation-related service that involves only your cable programming services, you should complete the following sections.

As for basic service, your equipment and installation rates for cable programming service must not be included in your program service rate, but rather must be completely unbundled. In addition, those equipment and installation rates must not exceed your actual costs, plus a reasonable profit. The method for unbundling your equipment and installation rates from cable programming service rates (if necessary), and for determining your permitted equipment and installation rates, is prescribed in Part II (unbundling) and Part III (rate-setting) of this form. Enter in the spaces below the rate figures you have calculated in Part III of this form, plus the franchise fees you must pay on each of these charges. Your actual cable programming service equipment and installation charges may not exceed these rates, although they may be lower.

(1) Charge(s) for cable programming service installations* (from Lines 6 or 7 of Equipment and Installation Worksheet)(**Note:** include appropriate franchise fee):

	Permitted	Actual
(a) Hourly rate	$____	$____
OR		
(b) Average installation charges:		
1. Installation of unwired homes	$____	$____
2. Installation of prewired homes	$____	$____
3. Installation of additional connection at time of initial installation	$____	$____
4. Installation of additional connections requiring separate installation	$____	$____
5. Other installations (specify)	$____	$____

---

* If you have further charges for additional connections beyond those reflected in your installation charge, attach a sheet explaining your calculations and setting forth those additional charges. See Note to Equipment and Installation Worksheet Instructions.

(2) Charge for changing tiers (if any) (from Line 29, 30 or 31 of Equipment and Installation Worksheet)(**Note:** include appropriate franchise fee):

Permitted	Actual
$_____	$_____

(3) Monthly charge for lease of remote controls (from Line 14 in Equipment and Installation Worksheet)(**Note:** include appropriate franchise fee):

	Permitted	Actual
Remote control type 1:	$_____	$_____
Remote control type 2:	$_____	$_____
Remote control type 3:	$_____	$_____

(4) Monthly charge for lease of converter boxes (from Line 21 in Equipment and Installation Worksheet)(**Note:** include appropriate franchise fee):

	Permitted	Actual
Converter box type 1:	$_____	$_____
Converter box type 2:	$_____	$_____
Converter box type 3:	$_____	$_____

(5) Monthly charge for lease of other equipment (from Line 28 in Equipment and Installation Worksheet)(**Note:** include appropriate franchise fee):

	Permitted	Actual
Cable home wiring:	$_____	$_____
Other equipment (specify):	$_____	$_____

FCC FORM -- PART II

WORKSHEETS AND INSTRUCTIONS FOR CALCULATING
MAXIMUM INITIAL PERMITTED RATES FOR REGULATED CABLE PROGRAMMING SERVICES

(INCLUDES BENCHMARK RATE TABLES)

Worksheets for Calculating Maximum Initial Permitted Rate per Channel for Basic Tier or Cable Programing Service

Cable Operator Name:	Community Unit ID (CUID):	Date:
Franchise Authority:	Basic Tier Cable Programing (Circle One)	

Worksheet 1

Calculation of Rates in Effect on Initial Date of Regulation and Benchmark Comparison

Line	Line Description	Instruction	A Basic	B Tier 2	C Tier 3	D Tier 4	E Total
101	Tier Charge (Monthly)	Enter for all Tiers Offered					
102	Tier Channels	Enter for all Tiers Offered					
103	Tier Subscribers	Enter for all Tiers Offered					
104	Equipment Revenue (Monthly)	Enter in Basic Column Only					
105	Charge Factor	(Line 101*Line 103)+Line 104A					
106	Channel Factor	Line 102 * Line 103					
107	Charge per Channel	Line 105E / Line 106E					
108	Franchise Fee Expense (Monthly)	Enter Only Fees Included in Line 101 Charges [See Worksheet Instructions]					
109	Franchise Fee Deduction	Line 108E / Line 106E					
110	Base Rate per Channel	Line 107E - Line 109E					
121	Benchmark Channel Rate	Enter from Attachment A					
122	GNP-PI (current)	Enter from Survey of Current Business, Table 7.13, Line 4, most recent quarter					
123	Inflation Factor	(Line 122E / 121.2) - 1 [121.2 = 3rd Qtr 1992 GNP-PI]					
124	Adjustment Time Period	Enter Number of Months from 9/30/92 to Date of Current Rate					
125	GNP-PI Time Period	Enter Number of Months from 9/30/92 to most recent GNP-PI Quarter					
126	Time Factor	Line 124E / Line 125E					
127	Inflation Adjustment Factor	(Line 123E * Line 126E) + 1					
128	Adjusted Benchmark Rate	Line 121E * Line 127E					

If Line 110E is less than or equal to Line 128E, skip to Worksheet 3 and enter Line 110E on Line 300.
If Line 110E is greater than Line 128E, complete Worksheet 2.

Worksheet 2

Calculation of Rates in Effect on September 30, 1992 and Benchmark Comparison

Line	Line Description	Instruction	A Basic	B Tier 2	C Tier 3	D Tier 4	E Total
201	Tier Charge (Monthly)	Enter for all Tiers Offered					
202	Tier Channels	Enter for all Tiers Offered					
203	Tier Subscribers	Enter for all Tiers Offered					
204	Equipment Revenue (Monthly)	Enter in Basic Column Only					
205	Charge Factor	(Line 201*Line 203)+Line 204A					
206	Channel Factor	Line 202 * Line 203					
207	Charge per Channel	Line 205E / Line 206E					
208	Franchise Fee Expense (Monthly)	Enter Only Fees Included in Line 201 Charges [See Worksheet Instructions]					
209	Franchise Fee Deduction	Line 208E / Line 206E					
210	Base Rate per Channel	Line 207E - Line 209E					
220	Benchmark Channel Rate	Enter from Attachment A					

If Line 210E is less than or equal to Line 220E, go to Worksheet 3 and enter Line 210E on Line 300.
If Line 210E is greater than Line 220E, go to Line 230.

230	Reduced Base Rate per Channel	Line 210E * 0.9 [Ten Percent Reduction]

Enter greater of lines 220E and 230E on Worksheet 3, Line 300.

Cable Operator Name:	Community Unit ID (CUID):	Date:
Franchise Authority:	Basic Tier Cable Programing (Circle One)	

Worksheet 3

Removal of Equipment and Installation Costs

Line	Line Description	Instruction	
300	Base Rate per Channel	Enter from Worksheet 1 (Line 110E) or Worksheet 2 (Line 210E or 230E)	
301	Equipment & Install. Cost (Monthly)	Enter from Part III the Sum of Line 3 and Box 3 (Schedule C), divided by 12	
302	Channel Factor	Enter from Worksheet 1 (Line 106E) or Worksheet 2 (Line 206E)	
303	Cost per Subscriber-channel	Line 301 / Line 302	
304	Base Service Rate per Channel	Line 300 - Line 303	

If Line 300 entered from Worksheet 1, go to Line 600 and enter Line 304.
If Line 300 entered from Worksheet 2, go to Worksheet 4.

Worksheet 4

Adjustment for Inflation

Line	Line Description	Instruction	
400	Base Service Rate per Channel	Enter from Line 304	
401	Inflation Adjustment Factor	Enter from Worksheet 1, Line 127E	
402	Adjusted Base Ser.Rate per Channel	Line 400 * Line 401	

If adjusted base service rate (Line 402) reflects current number of regulated channels, satellite channels, and subscribers, go to Line 600 and enter Line 402.
If it does not, complete Worksheet 5.

Worksheet 5

Adjustment for Changes in Number of Regulated Channels

Line	Line Description	Instruction	
500	Adjusted Base Ser.Rate per Channel	Enter from Worksheet 4 (Line 402) or Worksheet 3 (Line 304)	
501	Benchmark Channel Rate (Baseline)	Enter from Worksheet 2 (Line 220E)	
502	Benchmark Channel Rate (New)	Enter from Worksheet 1 (Line 110E)	
503	Channel Adjustment Factor	(Line 502 - Line 501) / Line 501	
504	Chan Ajustd Base Ser.Rate per Chan	Line 500 * (1 + Line 503)	

If Worksheet 5 was used, enter Line 504 on Line 600.

600	Maximum Initial Permitted Rate per Channel Enter from Line 304, 402, or 504.	

INSTRUCTIONS FOR WORKSHEETS CALCULATING MAXIMUM INITIAL PERMITTED RATES FOR REGULATED CABLE SERVICES

These instructions are to be used when completing Worksheets 1 through 5 of Part II of FCC Form 393. Using the worksheets will enable you to compute the maximum rate you may currently charge for regulated programming services under the FCC's rules. If your current rates exceed the maximum permitted rate you calculate on the worksheets, you must submit a cost-of-service showing to support your rates. If you do not do so, you will have your rates reduced to the maximum permitted rate and will be ordered to refund the excess to subscribers as necessary.

An overview of the various calculations you may be making is set forth in the General Instructions for completing this form. In addition, a decision flow chart is attached as Attachment B to this Part. This chart is designed to help you visualize the different steps you will be taking to compute your maximum initial permitted rate. Reviewing these materials first will assist you in completing the worksheets.

Instructions for Worksheet 1:

Worksheet 1 must be used to calculate the average Base Rate Per Channel that you are currently charging for regulated programming services and associated equipment. The Worksheet also must be used to compute the Benchmark Channel Rate with which your current Base Rate Per Channel will be compared. If your current Base Rate Per Channel is equal to or lower than the Benchmark Channel Rate, your rates will be found reasonable and you will not have to reduce them. If, however, your current Base Rate Per Channel exceeds the Benchmark Channel Rate, you will have to reduce your rate in accordance with the calculations set forth in Worksheets 2 through 5.

Line 101 -- Tier Charge. In the relevant column, enter your current monthly charge for your basic service tier and for each tier of cable programming service that you offer to subscribers. Do not include any premium programming offered on a per channel or per program basis. In addition, use your standard non-discounted program service rates; do not use any bulk or other discounted rates that you may offer to special classes of customers.

Line 102 -- Tier Channels. In the relevant column, enter the number of channels included in each tier of regulated programming services you offer to subscribers.

Line 103 -- Tier Subscribers. In the relevant column, enter the number of subscribers in your system who subscribe to each tier indicated.

Line 104 -- Equipment Revenue Per Month. To calculate your monthly average equipment revenue, take the total revenues you earned over the last fiscal year for the following categories of equipment and installation services: (1) converter box rental; (2) remote control rental; (3) additional outlet fees; (4) installation fees; (5) disconnect fees; (6) reconnect fees; and (7) tier

changing fees. Divide that total by 12 to compute your Equipment Revenue Per Month. Enter this figure in Column A of Line 104.

Weighting. In order to determine the average Base Per Channel Rate paid by subscribers to your system, the per channel rate for each tier is weighted according to the number of subscribers to that tier, so that tiers with more subscribers count more in determining the average than tiers with fewer subscribers. This weighting is done by determining a weighted average monthly rate per subscriber (the "Charge Factor" calculated in Line 105) and dividing by a weighted average of the number of channels received by each subscriber (the "Channel Factor" calculated in Line 106).

Line 105 -- Charge Factor. Multiply the monthly Tier Charge in Column A in Line 101 times the number of subscribers for that tier set forth in Column A in Line 103. Add the Equipment Revenue Per Month from Line 104 to this figure and enter the total in Column A, Line 105.

Next, multiply the monthly Tier Charge in Column B in Line 101 times the number of subscribers in Column B of Line 103. Enter the total in Column B in Line 105 -- do not add the Equipment Revenue Per Month from Line 104. Repeat this calculation for each other Column that you have completed.

Finally, add the figures in Columns A - D in Line 105 together and enter the total in Column E of Line 105.

Line 106 -- Channel Factor. Multiply the number of channels in Column A in Line 102 times the number of subscribers in Column A in Line 103. Enter the result in Column A of Line 106. Repeat the same calculation for each column in Line 106. Then, add the figures in Columns A - D in Line 106 together and enter the total in Column E of Line 106.

Line 107 -- Charge Per Channel. Divide the total Charge Factor from Column E, Line 105 by the total Channel Factor from Column E, Line 106. Enter the result in Column E of Line 107. You have now completed the weighting process.

Franchise Fees. The calculations in Lines 108 and 109 will enable you to separate out any franchise fees that you include in your subscriber rates. If you charge subscribers separately for franchise fees and do not include those fees in your service rates, you do not need to complete these steps and should enter $0.00 in Lines 108 and 109. If you do include franchise fees in your service rates, complete Lines 108 and 109. For purposes of this calculation, "franchise fees" means fees paid by the cable operator to the local franchising authority which only cable operators, and not owners of other kinds of businesses, are required to pay.

Line 108 -- Franchise Fee Expense (Monthly). Calculate the franchise fees you pay for regulated services and equipment during an average month. Enter that total monthly payment in Column E of Line 108.

Line 109 -- Franchise Fee Deduction. To calculate the weighted per channel franchise fee, divide the Monthly Franchise Fee Expense from Line 108, Column E by the total Channel Factor from Line 106, Column E. Enter the result in

Column E of Line 109.

Line 110 -- Base Rate Per Channel. Subtract the Franchise Fee Deduction in Line 109 from the Charge Per Channel in Line 107. Enter the result in the box in Line 110. This number is your current Base Rate Per Channel. It is the number that will be compared to your competitive benchmark to determine whether your current rates are reasonable or need to be reduced.

Benchmark Calculation. The next calculation you will perform will give you your competitive benchmark rate. This rate represents the rate that would be charged by a cable system facing competition that has similar characteristics to your own. The three characteristics that will be used in this analysis are: (1) the number of channels on regulated program tiers that you offer; (2) the number of subscribers served by your cable system; and (3) the number of satellite-delivered signals you carry on your regulated program tiers.

Line 121 -- Benchmark Per Channel Rate. Attachment A contains the benchmark rates per channel for cable systems with different numbers of channels on regulated tiers and different numbers of satellite-delivered signals. There are eight tables of benchmark rates for systems with 50, 100, 250, 500, 750, 1000, 1500 and 10,000 subscribers. Using the table with number of subscribers closest to the number of subscribers on your system, select the benchmark per channel rate from the table. (**Note:** All systems with 10,000 or more subscribers should use the 10,000 subscriber table. Our analysis revealed that there is no measurable difference in the benchmark rates among systems with more than 10,000 subscribers.) Enter the selected benchmark per channel rate in Column E of Line 121. (**Note:** If the total number of channels on regulated tiers and/or the total number of satellite-delivered channels on those tiers for your system falls between the channel increments listed in the tables, you must interpolate the correct benchmark per channel rate. Instructions on how to perform these interpolations are attached at the end of the benchmark rate tables. If you do not wish to interpolate the correct benchmark rate, select the lower rate of the two benchmark rates you fall between. Alternatively, you may apply the FCC's benchmark formula to calculate your benchmark rate.)

Inflation Adjustment. The benchmark per channel rate that you have just selected was based on cable rates in effect on September 30, 1992. Therefore, to make sure that the benchmark against which you will compare your current rates is not too low, the benchmark per channel rate must be adjusted forward for inflation since September 30, 1992. The calculations in Lines 122 through 128 of Worksheet 1 will enable you to adjust the Benchmark Per Channel Rate in Line 121 for inflation.

Line 122 -- GNP-PI (Current). Enter the Gross National Product Price Index (GNP-PI) for the most recent quarter in Column E of Line 122. This number can be found in the "Survey of Current Business," Table 7.13, Line 4 (Most Recent Quarter), which is published monthly by the U.S. Department of Commerce. The number will also be published periodically by the FCC.

Line 123 -- Inflation Factor. Divide the current GNP-PI from Line 122 by the GNP-PI for the third quarter of 1992, which is 121.2. Subtract 1 from the resulting figure and enter the number in Column E of Line 123.

Line 124 -- Adjustment Time Period. Enter in Column E of Line 124 the number of months from September 30, 1992 to the date you will submit this form.

Line 125 -- GNP-PI Time Period. Enter in Column E of Line 125 the number of months from September 30, 1992 to the end of the most recent GNP-PI quarter.

Line 126 -- Time Factor. Divide the number of months in Line 124 by the number of months in Line 125 and enter in Column E of Line 126.

Line 127 -- Inflation Adjustment Factor. Multiply the Inflation Factor in Line 123 times the Time Factor in Line 126. Add 1 to the resulting figure and enter the number in Column E of Line 127.

Line 128 -- Adjusted Benchmark Rate. Multiply the Benchmark Channel Rate from Line 121 times the Inflation Adjustment Factor from Line 127. Enter the resulting figure in Column E of Line 128. This is your benchmark channel rate that has been adjusted forward for inflation.

You are now ready to compare your current rate to the benchmark:

If the Base Rate Per Channel in Line 110 is **less than or equal to** the Adjusted Benchmark Rate in Line 128, your current per channel rate is reasonable and you do not need to reduce it. You should now skip to Worksheet 3 and enter the rate from Line 110 in Line 300 of Worksheet 3. This worksheet will enable you to remove your equipment and installation costs from your Base Rate Per Channel. The resulting number will be the maximum rate per channel you can currently charge for regulated programming services.

If the Base Rate Per Channel in Line 110 is **greater than** the Adjusted Benchmark Rate in Line 128, your current per channel rate is unreasonable and must be reduced if you do not wish to submit a cost-of-service showing. To determine what your maximum permitted rate is, you must complete Worksheet 2.

Instructions for Worksheet 2:

If your current per channel rate is above the benchmark, you must now examine your per channel rate as of September 30, 1992 and compare it to the benchmark. If your September 30, 1992 rate was also above the benchmark, your maximum permitted rate will be your September 30, 1992 rate, reduced by 10 percent or to the benchmark, whichever is less. **If you do not implement this rate reduction, you must submit a cost-of-service showing.** If your current rate is above the benchmark but your September 30, 1992 rate was equal to or below the benchmark, your maximum permitted rate will be the benchmark rate, as adjusted for inflation. **If you do not reduce your rate to this level, you must submit a cost-of-service showing.**

Worksheet 2 will enable you to calculate your Base Per Channel Rate as of September 30, 1992 and then compare that rate to the Benchmark Channel Rate. The calculations will mirror those you performed when computing your current Base Per Channel Rate on Worksheet 1.

Line 201 -- Tier Charge. In the relevant column, enter your monthly charge as of September 30, 1992 for your basic service tier and for each tier of cable programming service that you offered to subscribers on that date. Do not include any premium programming offered on a per channel or per program basis. In addition, use your standard non-discounted program service rates; do not use any bulk or other discounted rates that you may have offered to special classes of customers.

Line 202 -- Tier Channels. In the relevant column, enter the number of channels included in each tier of regulated programming services you offered to subscribers as of September 30, 1992.

Line 203 -- Tier Subscribers. In the relevant column, enter the number of subscribers in your system who subscribed to each tier indicated as of September 30, 1992.

Line 204 -- Equipment Revenue Per Month. To calculate your monthly average equipment revenue as of September 30, 1992, take the total revenues you earned over the preceding fiscal year for the following categories of equipment and installation services: (1) converter box rental; (2) remote control rental; (3) additional outlet fees; (4) installation fees; (5) disconnect fees; (6) reconnect fees; and (7) tier changing fees. Divide that total by 12 to compute your Equipment Revenue Per Month as of September 30, 1992. Enter this figure in Column A of Line 204.

Line 205 -- Charge Factor. Multiply the monthly Tier Charge in Column A in Line 201 times the number of subscribers for that tier set forth in Column A in Line 203. Add the Equipment Revenue Per Month from Line 204 to this figure and enter the total in Column A, Line 205.

Next, multiply the monthly Tier Charge in Column B in Line 201 times the number of subscribers in Column B of Line 203. Enter the total in Column B in Line 205 -- do not add the Equipment Revenue Per Month from Line 204. Repeat this calculation for each other Column that you have completed.

Next, add the figures in Columns A - D in Line 205 together and enter the total in Column E of Line 205.

Line 206 -- Channel Factor. Multiply the number of channels in Column A in Line 202 times the number of subscribers in Column A in Line 203. Enter the result in Column A of Line 206. Repeat the same calculation for each column in Line 206. Then, add the figures in Columns A - D in Line 206 together and enter the total in Column E of Line 206.

Line 207 -- Charge Per Channel. Divide the total Charge Factor from Column E, Line 205 by the total Channel Factor from Column E, Line 206. Enter the result in Column E of Line 207.

Line 208 -- Franchise Fee Expense (Monthly). Calculate the franchise fees you paid for regulated services and equipment during an average month for the fiscal year preceding September 30, 1992. Enter that total monthly payment in Column E of Line 208.

Line 209 -- Franchise Fee Deduction. To calculate the weighted per channel franchise fee, divide the Monthly Franchise Fee Expense from Line 208, Column E by the total Channel Factor from Line 206, Column E. Enter the result in Column E of Line 209.

Line 210 -- Base Rate Per Channel (September 30, 1992). Subtract the Franchise Fee Deduction in Line 209 from the Charge Per Channel in Line 207. Enter the result in the box in Line 210. This number is your Base Rate Per Channel as of September 30, 1992. It will be compared to your competitive benchmark as of September 30, 1992 as part of computing your current maximum permitted rate.

Line 220 -- Benchmark Channel Rate (September 30, 1992). To compare your September 30, 1992 Base Per Channel Rate to the benchmark, use the number of regulated channels, satellite-delivered signals and subscribers on your system as of September 30, 1992 to find the appropriate September 30, 1992 Benchmark Channel Rate on the benchmark tables attached as Attachment A. (See instructions for Line 121, above, for further guidance in using benchmark tables.)

You are now ready to compare your September 30, 1992 rate to the September 30, 1992 benchmark:

If your September 30, 1992 Base Rate Per Channel (Line 210) is **less than or equal to** the September 30, 1992 Benchmark Channel Rate (Line 220), your maximum permitted rate will be the September 30, 1992 benchmark rate, adjusted forward for inflation. You may now skip to Worksheet 3 and enter the number in Line 210 on Line 300. Worksheet 3 will enable you to remove your equipment and installation costs from this per channel rate to determine what your maximum permitted program service rate should be.

If your September 30, 1992 Base Rate Per Channel (Line 210) is **greater than** the September 30, 1992 Benchmark Channel Rate (Line 220), your maximum permitted rate will be your September 30, 1992 Base Rate Per Channel, reduced by 10 percent or to the benchmark, whichever yields the higher rate. To compute this rate, you will need to complete Line 230.

Line 230 -- Reduced Base Rate Per Channel. Multiply your September 30, 1992 Base Rate Per Channel (Line 210) times 0.9 to reduce that rate by 10 percent; enter the resulting number in the box in Line 230. Then, take the **greater** of the September 30, 1992 benchmark (Line 220) and the reduced rate per channel you have just computed in Line 230 and enter it in Line 300 on Worksheet 3.

Instructions for Worksheet 3:

The per channel rates you have calculated so far have included both programming service rates and rates for equipment and installations. The 1992 Cable Act, however, requires you to unbundle your programming service rates from your equipment and installation rates, as well as to unbundle those rates one from the other. Worksheet 3 is thus designed to separate your equipment and installation costs from your programming service rates. The resulting rate will be a per channel rate for programming services alone.

Line 300 -- Base Rate Per Channel. If you completed Worksheet 1 only, enter your Base Rate Per Channel from Line 110 on Worksheet 1 on Line 300. If you completed both Worksheets 1 and 2, enter the appropriate figure from either Line 210 or Line 230.

Line 301 -- Equipment and Installation Costs (Monthly). In order to complete this line, you must have completed Schedules A, B and C and the Worksheet for Equipment and Installation Charges in Part III of this form. From those materials, retrieve the numbers entered in Line 3 of the Equipment Worksheet and Box 3 of Schedule C and add them together. Take the resulting total and divide by 12. This figure reflects the costs you incur in an average month for equipment and installations. Enter this number in Line 301.

Line 302 -- Channel Factor. If you completed Worksheet 1 only, enter the number from Line 106, Column E. If you completed Worksheet 2, enter the number from Line 206, Column E.

Line 303 -- Cost per Subscriber-Channel. To determine your equipment/ installation costs per subscriber per channel, divide your monthly equipment and installation costs from Line 301 by the channel factor from Line 302. Enter the resulting figure in Line 303.

Line 304 -- Base Service Rate Per Channel. To unbundle your equipment and installation costs from your base per channel rate, subtract the Costs Per Subscriber Per Channel in Line 303 from the Base Per Channel Rate in Line 300. Enter the resulting figure in Line 304.

If you completed Worksheet 1 only, the rate reflected in Line 304 is your maximum permitted rate per channel for programming services. You should enter this rate in Line 600 and complete the Cover Sheet to this form.

If you completed Worksheets 1 and 2, you will need to adjust the Base Service Rate Per Channel in Line 304 for inflation and therefore must complete Worksheet 4. Moreover, if there have been changes in the number of regulated channels and/or subscribers on your system since September 30, 1992, you will also need to adjust the Base Service Rate Per Channel in Line 304 to reflect these changes. This can be done by completing Worksheet 5 after you finish Worksheet 4.

Instructions for Worksheet 4:

Worksheet 4 is to be used to adjust your maximum permitted rate for inflation that has occurred between September 30, 1992 and the date you submit this form. Since you have previously calculated the appropriate inflation adjustment factor in completing Worksheet 1, you will simply need to apply that factor to the Base Rate Per Channel for programming service calculated in Worksheet 3.

Line 400 -- Base Service Rate Per Channel. Enter the Base Service Rate Per Channel from Line 304 of Worksheet 3.

Line 401 -- Inflation Adjustment Factor. Enter the Inflation Adjustment Factor you previously calculated from Line 127 of Worksheet 1.

Line 403 -- Adjusted Base Service Rate Per Channel. Multiply the Base Service Rate Per Channel in Line 400 times the Inflation Adjustment Factor in Line 401. Enter the resulting number in Line 403. This figure is your Base Service Rate Per Channel, as adjusted for inflation.

Adjustments for Changes Since September 30, 1992. If you completed Worksheet 2, the benchmark channel rate you used for those calculations was based on the number of regulated channels, satellite-delivered signals and subscribers on your system as of September 30, 1992. If none of these factors has since changed, you may appropriately use that benchmark and therefore need not complete Worksheet 5. If, however, there has been a change in your system with regard to one or more of these three factors since September 30, 1992, the benchmark against which you compared your current rates may also have changed. Therefore, you will need to adjust your permitted rate to account for these changes. Worksheet 5 should be used to perform these calculations.

Line 500 -- Adjusted Base Service Rate Per Channel. Enter your Base Service Rate Per Channel from Line 304 on Worksheet 3 if you did not complete Worksheet 4. If you did complete Worksheet 4, enter your Adjusted Base Service Rate Per Channel from Line 402.

Line 501 -- Benchmark Channel Rate (Baseline). Enter the Benchmark Channel Rate you computed in Line 220 of Worksheet 2.

Line 502 -- Benchmark Channel Rate (New). Enter the Benchmark Channel Rate you computed in Line 110 of Worksheet 1.

Line 503 -- Channel Adjustment Factor. Subtract your Baseline Benchmark Channel Rate in Line 501 from your New Benchmark Channel Rate in Line 502. Divide the resulting number by your Baseline Benchmark Channel Rate in Line 501 and enter this figure in Line 503.

Line 504 -- Channel Adjusted Base Service Rate Per Channel. Take the Channel Adjustment Factor in Line 503 and add 1. Then, multiply the resulting figure times the Adjusted Base Service Rate Per Channel in Line 500. This will give you your Channel Adjusted Base Service Rate Per Channel. Enter this number in Line 600.

Congratulations! You have now completed all calculations necessary to compute your maximum permitted rate per channel under the FCC's rate regulations. The rate for each tier of regulated services you offer will be reasonable under the FCC's rules if it does not exceed the product of this rate per channel times the number of channels on that tier. To make this final calculation, the number you entered on Line 600 should now be entered on Page 2 (or 4) of the Cover Sheet to this form. Follow the directions on the Cover Sheet to finish your computations.

ATTACHMENT A Benchmark Cable Rates

PRICE PER CHANNEL for systems with 50 subscribers and less than 25 channels

Weighted and Adjusted for Franchise Fees and Equipment

Satellite Channels	Total channels on regulated tiers: 5	6	7	8	9	10	11	12	13	14	15	16	17	18	19	20	21	22	23	24	Satellite Channels
v																					v
0	$2.912	$2.477	$2.180	$1.919	$1.726	$1.574	$1.446	$1.339	$1.247	$1.167	$1.098	$1.037	$0.983	$0.934	$0.890	$0.851	$0.815	$0.782	$0.751	$0.723	0
1	$2.912	$2.477	$2.180	$1.919	$1.726	$1.574	$1.446	$1.339	$1.247	$1.167	$1.098	$1.037	$0.983	$0.934	$0.890	$0.851	$0.815	$0.782	$0.751	$0.723	1
2	$3.123	$2.656	$2.316	$2.057	$1.853	$1.688	$1.551	$1.435	$1.337	$1.252	$1.177	$1.112	$1.054	$1.001	$0.955	$0.912	$0.873	$0.838	$0.806	$0.776	2
3	$3.253	$2.767	$2.413	$2.143	$1.930	$1.758	$1.615	$1.495	$1.393	$1.304	$1.226	$1.158	$1.097	$1.043	$0.994	$0.950	$0.910	$0.873	$0.839	$0.808	3
4	$3.348	$2.848	$2.484	$2.206	$1.987	$1.809	$1.663	$1.539	$1.433	$1.342	$1.262	$1.192	$1.130	$1.074	$1.023	$0.978	$0.936	$0.899	$0.864	$0.832	4
5	$3.424	$2.912	$2.540	$2.256	$2.032	$1.851	$1.700	$1.574	$1.466	$1.373	$1.291	$1.219	$1.155	$1.098	$1.047	$1.000	$0.958	$0.919	$0.883	$0.851	5
6		$2.966	$2.587	$2.298	$2.070	$1.885	$1.732	$1.603	$1.493	$1.398	$1.315	$1.242	$1.177	$1.118	$1.066	$1.019	$0.975	$0.936	$0.900	$0.866	6
7			$2.627	$2.334	$2.102	$1.914	$1.759	$1.628	$1.516	$1.420	$1.336	$1.261	$1.195	$1.136	$1.083	$1.035	$0.991	$0.951	$0.914	$0.880	7
8				$2.365	$2.130	$1.940	$1.783	$1.650	$1.537	$1.439	$1.354	$1.278	$1.211	$1.151	$1.097	$1.049	$1.004	$0.963	$0.926	$0.892	8
9					$2.156	$1.963	$1.804	$1.670	$1.555	$1.456	$1.370	$1.293	$1.226	$1.165	$1.110	$1.061	$1.016	$0.975	$0.937	$0.902	9
10						$1.984	$1.823	$1.688	$1.572	$1.472	$1.384	$1.307	$1.239	$1.177	$1.122	$1.072	$1.027	$0.985	$0.947	$0.912	10
11							$1.841	$1.704	$1.587	$1.486	$1.398	$1.320	$1.251	$1.189	$1.133	$1.083	$1.037	$0.995	$0.956	$0.921	11
12								$1.719	$1.601	$1.499	$1.410	$1.331	$1.262	$1.199	$1.143	$1.092	$1.046	$1.004	$0.965	$0.929	12
13									$1.614	$1.511	$1.421	$1.342	$1.272	$1.209	$1.152	$1.101	$1.054	$1.012	$0.973	$0.936	13
14										$1.522	$1.432	$1.352	$1.281	$1.218	$1.161	$1.109	$1.062	$1.019	$0.980	$0.943	14
15											$1.442	$1.362	$1.290	$1.226	$1.169	$1.117	$1.070	$1.026	$0.987	$0.950	15
16												$1.371	$1.299	$1.234	$1.177	$1.124	$1.077	$1.033	$0.993	$0.956	16
17													$1.307	$1.242	$1.184	$1.131	$1.083	$1.039	$0.999	$0.962	17
18														$1.249	$1.191	$1.138	$1.089	$1.045	$1.005	$0.968	18
19															$1.197	$1.144	$1.095	$1.051	$1.010	$0.973	19
20																$1.150	$1.101	$1.056	$1.016	$0.978	20
21																	$1.106	$1.062	$1.021	$0.983	21
22																		$1.067	$1.025	$0.987	22
23																			$1.030	$0.992	23
24																				$0.996	24

PRICE PER CHANNEL for systems with 100 subscribers and less than 25 channels

Weighted and Adjusted for Franchise Fees and Equipment

Satellite Channels	Total channels on regulated tiers: 5	6	7	8	9	10	11	12	13	14	15	16	17	18	19	20	21	22	23	24	Satellite Channels
v																					v
0	$2.708	$2.302	$2.007	$1.783	$1.606	$1.462	$1.344	$1.244	$1.159	$1.085	$1.020	$0.964	$0.913	$0.868	$0.827	$0.790	$0.757	$0.728	$0.698	$0.672	0
1	$2.708	$2.302	$2.007	$1.783	$1.606	$1.462	$1.344	$1.244	$1.159	$1.085	$1.020	$0.964	$0.913	$0.868	$0.827	$0.790	$0.757	$0.728	$0.698	$0.672	1
2	$2.901	$2.466	$2.152	$1.912	$1.722	$1.568	$1.441	$1.334	$1.242	$1.163	$1.094	$1.033	$0.979	$0.931	$0.887	$0.847	$0.812	$0.779	$0.749	$0.721	2
3	$3.022	$2.571	$2.242	$1.991	$1.794	$1.633	$1.501	$1.389	$1.294	$1.212	$1.140	$1.076	$1.020	$0.969	$0.924	$0.883	$0.845	$0.811	$0.780	$0.751	3
4	$3.111	$2.646	$2.308	$2.050	$1.846	$1.681	$1.545	$1.430	$1.332	$1.247	$1.173	$1.108	$1.050	$0.998	$0.951	$0.909	$0.870	$0.836	$0.803	$0.773	4
5	$3.182	$2.706	$2.360	$2.096	$1.888	$1.719	$1.580	$1.463	$1.362	$1.275	$1.200	$1.133	$1.074	$1.020	$0.973	$0.929	$0.890	$0.854	$0.821	$0.790	5
6		$2.756	$2.404	$2.136	$1.923	$1.751	$1.609	$1.490	$1.387	$1.299	$1.222	$1.154	$1.093	$1.039	$0.991	$0.946	$0.906	$0.870	$0.836	$0.805	6
7			$2.441	$2.168	$1.953	$1.779	$1.634	$1.513	$1.409	$1.319	$1.241	$1.172	$1.110	$1.056	$1.008	$0.961	$0.921	$0.883	$0.849	$0.818	7
8				$2.199	$1.980	$1.803	$1.656	$1.533	$1.428	$1.337	$1.258	$1.188	$1.125	$1.070	$1.020	$0.974	$0.933	$0.895	$0.861	$0.829	8
9					$2.003	$1.824	$1.676	$1.552	$1.445	$1.353	$1.273	$1.202	$1.139	$1.083	$1.032	$0.986	$0.944	$0.908	$0.871	$0.839	9
10						$1.844	$1.694	$1.568	$1.461	$1.368	$1.286	$1.215	$1.151	$1.094	$1.043	$0.996	$0.954	$0.916	$0.880	$0.847	10
11							$1.710	$1.583	$1.475	$1.381	$1.299	$1.226	$1.162	$1.105	$1.053	$1.006	$0.963	$0.924	$0.889	$0.856	11
12								$1.597	$1.488	$1.393	$1.310	$1.237	$1.172	$1.114	$1.062	$1.015	$0.972	$0.932	$0.896	$0.863	12
13									$1.500	$1.404	$1.321	$1.247	$1.182	$1.123	$1.071	$1.023	$0.980	$0.940	$0.904	$0.870	13
14										$1.415	$1.331	$1.257	$1.191	$1.132	$1.079	$1.031	$0.987	$0.947	$0.910	$0.877	14
15											$1.340	$1.265	$1.199	$1.140	$1.086	$1.038	$0.994	$0.954	$0.917	$0.883	15
16												$1.274	$1.207	$1.147	$1.093	$1.045	$1.000	$0.960	$0.923	$0.889	16
17													$1.214	$1.154	$1.100	$1.051	$1.006	$0.966	$0.928	$0.894	17
18														$1.161	$1.106	$1.057	$1.012	$0.971	$0.934	$0.899	18
19															$1.112	$1.063	$1.018	$0.977	$0.939	$0.904	19
20																$1.068	$1.023	$0.982	$0.944	$0.909	20
21																	$1.028	$0.986	$0.948	$0.913	21
22																		$0.991	$0.953	$0.917	22
23																			$0.957	$0.922	23
24																				$0.926	24

ATTACHMENT A Benchmark Cable Rates

PRICE PER CHANNEL for systems with 50 subscribers and 25 or more channels

Weighted and Adjusted for Franchise Fees and Equipment

Total channels on regulated tiers:																	
Satellite Channels	25	30	35	40	45	50	55	60	65	70	75	80	85	90	95	100	Satellite Channels
v																	v
0	$0.698	$0.593	$0.518	$0.460	$0.414	$0.377	$0.346	$0.321	$0.299	$0.280	$0.263	$0.248	$0.235	$0.224	$0.213	$0.204	0
5	$0.820	$0.698	$0.609	$0.540	$0.487	$0.443	$0.407	$0.377	$0.351	$0.329	$0.309	$0.292	$0.277	$0.263	$0.251	$0.240	5
10	$0.880	$0.748	$0.652	$0.580	$0.522	$0.475	$0.437	$0.404	$0.377	$0.353	$0.332	$0.313	$0.297	$0.282	$0.269	$0.257	10
15	$0.916	$0.779	$0.680	$0.604	$0.544	$0.495	$0.455	$0.421	$0.392	$0.367	$0.345	$0.326	$0.309	$0.294	$0.280	$0.268	15
20	$0.943	$0.802	$0.700	$0.621	$0.560	$0.510	$0.468	$0.434	$0.404	$0.378	$0.356	$0.336	$0.318	$0.302	$0.288	$0.275	20
25	$0.965	$0.820	$0.715	$0.635	$0.572	$0.521	$0.479	$0.443	$0.413	$0.387	$0.364	$0.343	$0.325	$0.309	$0.295	$0.282	25
30		$0.836	$0.729	$0.647	$0.583	$0.531	$0.488	$0.452	$0.421	$0.394	$0.370	$0.350	$0.331	$0.315	$0.300	$0.287	30
35			$0.740	$0.657	$0.592	$0.539	$0.495	$0.459	$0.427	$0.400	$0.376	$0.355	$0.337	$0.320	$0.305	$0.291	35
40				$0.666	$0.600	$0.547	$0.502	$0.465	$0.433	$0.405	$0.381	$0.360	$0.341	$0.324	$0.309	$0.295	40
45					$0.607	$0.553	$0.508	$0.470	$0.438	$0.410	$0.386	$0.364	$0.345	$0.328	$0.313	$0.299	45
50						$0.559	$0.514	$0.475	$0.443	$0.415	$0.390	$0.368	$0.349	$0.332	$0.316	$0.302	50
55							$0.519	$0.480	$0.447	$0.419	$0.394	$0.372	$0.352	$0.335	$0.319	$0.305	55
60								$0.484	$0.451	$0.422	$0.397	$0.375	$0.355	$0.338	$0.322	$0.308	60
65									$0.455	$0.426	$0.400	$0.378	$0.358	$0.341	$0.325	$0.310	65
70										$0.429	$0.403	$0.381	$0.361	$0.343	$0.327	$0.312	70
75											$0.406	$0.384	$0.363	$0.345	$0.329	$0.315	75
80												$0.386	$0.366	$0.348	$0.331	$0.317	80
85													$0.368	$0.350	$0.333	$0.319	85
90														$0.352	$0.335	$0.320	90
95															$0.337	$0.322	95
100																$0.324	100

PRICE PER CHANNEL for systems with 100 subscribers and 25 or more channels

Weighted and Adjusted for Franchise Fees and Equipment

Total channels on regulated tiers:																	
Satellite Channels	25	30	35	40	45	50	55	60	65	70	75	80	85	90	95	100	Satellite Channels
v																	v
0	$0.648	$0.551	$0.481	$0.427	$0.385	$0.350	$0.322	$0.298	$0.278	$0.260	$0.244	$0.231	$0.219	$0.208	$0.198	$0.189	0
5	$0.762	$0.648	$0.565	$0.502	$0.452	$0.412	$0.379	$0.350	$0.326	$0.306	$0.287	$0.271	$0.257	$0.244	$0.233	$0.223	5
10	$0.817	$0.695	$0.606	$0.538	$0.485	$0.442	$0.406	$0.376	$0.350	$0.328	$0.308	$0.291	$0.276	$0.262	$0.250	$0.239	10
15	$0.851	$0.724	$0.632	$0.561	$0.505	$0.460	$0.423	$0.391	$0.364	$0.341	$0.321	$0.303	$0.287	$0.273	$0.260	$0.249	15
20	$0.876	$0.745	$0.650	$0.577	$0.520	$0.474	$0.435	$0.403	$0.375	$0.351	$0.330	$0.312	$0.296	$0.281	$0.268	$0.256	20
25	$0.896	$0.762	$0.665	$0.590	$0.532	$0.484	$0.445	$0.412	$0.384	$0.359	$0.338	$0.319	$0.302	$0.287	$0.274	$0.262	25
30		$0.776	$0.677	$0.601	$0.542	$0.493	$0.453	$0.420	$0.391	$0.366	$0.344	$0.325	$0.308	$0.293	$0.279	$0.267	30
35			$0.688	$0.611	$0.550	$0.501	$0.460	$0.426	$0.397	$0.372	$0.350	$0.330	$0.313	$0.297	$0.283	$0.271	35
40				$0.619	$0.558	$0.508	$0.467	$0.432	$0.402	$0.377	$0.354	$0.335	$0.317	$0.301	$0.287	$0.274	40
45					$0.564	$0.514	$0.472	$0.437	$0.407	$0.381	$0.359	$0.339	$0.321	$0.305	$0.291	$0.278	45
50						$0.519	$0.477	$0.442	$0.411	$0.385	$0.362	$0.342	$0.324	$0.308	$0.294	$0.281	50
55							$0.482	$0.446	$0.415	$0.389	$0.366	$0.345	$0.327	$0.311	$0.297	$0.283	55
60								$0.450	$0.419	$0.392	$0.369	$0.348	$0.330	$0.314	$0.299	$0.286	60
65									$0.422	$0.396	$0.372	$0.351	$0.333	$0.316	$0.302	$0.288	65
70										$0.398	$0.375	$0.354	$0.335	$0.319	$0.304	$0.290	70
75											$0.377	$0.356	$0.338	$0.321	$0.308	$0.292	75
80												$0.359	$0.340	$0.323	$0.306	$0.294	80
85													$0.342	$0.325	$0.310	$0.296	85
90														$0.327	$0.312	$0.298	90
95															$0.313	$0.299	95
100																$0.301	100

ATTACHMENT A Benchmark Cable Rates

PRICE PER CHANNEL for systems with 250 subscribers and less than 25 channels

Weighted and Adjusted for Franchise Fees and Equipment

Total channels on regulated tiers:	5	6	7	8	9	10	11	12	13	14	15	16	17	18	19	20	21	22	23	24	
Satellite Channels																					Satellite Channels
0	$2.589	$2.202	$1.921	$1.706	$1.537	$1.399	$1.286	$1.190	$1.109	$1.038	$0.976	$0.922	$0.874	$0.830	$0.792	$0.756	$0.724	$0.695	$0.668	$0.643	0
1	$2.589	$2.202	$1.921	$1.706	$1.537	$1.399	$1.286	$1.190	$1.109	$1.038	$0.976	$0.922	$0.874	$0.830	$0.792	$0.756	$0.724	$0.695	$0.668	$0.643	1
2	$2.776	$2.361	$2.059	$1.829	$1.648	$1.500	$1.379	$1.276	$1.189	$1.113	$1.047	$0.989	$0.937	$0.890	$0.849	$0.811	$0.777	$0.745	$0.716	$0.690	2
3	$2.892	$2.460	$2.145	$1.905	$1.716	$1.563	$1.436	$1.329	$1.238	$1.159	$1.090	$1.030	$0.976	$0.927	$0.884	$0.845	$0.809	$0.776	$0.746	$0.718	3
4	$2.977	$2.532	$2.208	$1.961	$1.767	$1.609	$1.478	$1.368	$1.275	$1.193	$1.122	$1.060	$1.004	$0.955	$0.910	$0.869	$0.833	$0.799	$0.768	$0.740	4
5	$3.044	$2.590	$2.258	$2.006	$1.807	$1.645	$1.512	$1.399	$1.303	$1.220	$1.148	$1.084	$1.027	$0.976	$0.931	$0.889	$0.852	$0.817	$0.785	$0.756	5
6		$2.637	$2.300	$2.043	$1.840	$1.676	$1.540	$1.425	$1.328	$1.243	$1.169	$1.104	$1.046	$0.994	$0.948	$0.906	$0.867	$0.832	$0.800	$0.770	6
7			$2.336	$2.075	$1.869	$1.702	$1.564	$1.448	$1.348	$1.262	$1.187	$1.121	$1.063	$1.010	$0.963	$0.920	$0.881	$0.845	$0.812	$0.782	7
8				$2.103	$1.894	$1.725	$1.585	$1.467	$1.367	$1.280	$1.204	$1.137	$1.077	$1.024	$0.976	$0.932	$0.893	$0.857	$0.823	$0.793	8
9					$1.917	$1.746	$1.604	$1.485	$1.383	$1.295	$1.218	$1.150	$1.090	$1.036	$0.987	$0.943	$0.903	$0.867	$0.833	$0.802	9
10						$1.764	$1.621	$1.501	$1.398	$1.309	$1.231	$1.162	$1.101	$1.047	$0.998	$0.953	$0.913	$0.876	$0.842	$0.811	10
11							$1.637	$1.515	$1.411	$1.321	$1.243	$1.174	$1.112	$1.057	$1.007	$0.963	$0.922	$0.885	$0.850	$0.819	11
12								$1.528	$1.423	$1.333	$1.254	$1.184	$1.122	$1.066	$1.016	$0.971	$0.930	$0.892	$0.858	$0.826	12
13									$1.435	$1.344	$1.264	$1.193	$1.131	$1.075	$1.025	$0.979	$0.937	$0.900	$0.865	$0.833	13
14										$1.354	$1.273	$1.202	$1.139	$1.083	$1.032	$0.986	$0.944	$0.906	$0.871	$0.839	14
15											$1.282	$1.211	$1.147	$1.091	$1.039	$0.993	$0.951	$0.913	$0.877	$0.845	15
16												$1.219	$1.155	$1.098	$1.046	$1.000	$0.957	$0.918	$0.883	$0.850	16
17													$1.162	$1.104	$1.053	$1.006	$0.963	$0.924	$0.888	$0.855	17
18														$1.111	$1.059	$1.012	$0.969	$0.929	$0.893	$0.860	18
19															$1.064	$1.017	$0.974	$0.935	$0.898	$0.865	19
20																$1.022	$0.979	$0.939	$0.903	$0.870	20
21																	$0.984	$0.944	$0.907	$0.874	21
22																		$0.948	$0.912	$0.878	22
23																			$0.916	$0.882	23
24																				$0.886	24

PRICE PER CHANNEL for systems with 500 subscribers and less than 25 channels

Weighted and Adjusted for Franchise Fees and Equipment

Total channels on regulated tiers:	5	6	7	8	9	10	11	12	13	14	15	16	17	18	19	20	21	22	23	24	
Satellite Channels																					Satellite Channels
0	$2.552	$2.170	$1.893	$1.681	$1.514	$1.379	$1.267	$1.173	$1.092	$1.023	$0.962	$0.909	$0.861	$0.818	$0.780	$0.745	$0.714	$0.685	$0.658	$0.634	0
1	$2.552	$2.170	$1.893	$1.681	$1.514	$1.379	$1.267	$1.173	$1.092	$1.023	$0.962	$0.909	$0.861	$0.818	$0.780	$0.745	$0.714	$0.685	$0.658	$0.634	1
2	$2.736	$2.327	$2.029	$1.803	$1.624	$1.479	$1.359	$1.258	$1.171	$1.097	$1.032	$0.974	$0.923	$0.877	$0.836	$0.799	$0.765	$0.734	$0.706	$0.680	2
3	$2.850	$2.424	$2.114	$1.878	$1.691	$1.540	$1.415	$1.310	$1.220	$1.142	$1.075	$1.015	$0.962	$0.914	$0.871	$0.832	$0.797	$0.765	$0.735	$0.709	3
4	$2.933	$2.495	$2.178	$1.933	$1.741	$1.585	$1.457	$1.348	$1.256	$1.176	$1.106	$1.045	$0.990	$0.941	$0.897	$0.857	$0.820	$0.787	$0.757	$0.729	4
5	$3.000	$2.552	$2.226	$1.977	$1.780	$1.621	$1.490	$1.379	$1.284	$1.203	$1.131	$1.068	$1.012	$0.962	$0.917	$0.876	$0.839	$0.805	$0.774	$0.745	5
6		$2.599	$2.267	$2.013	$1.813	$1.651	$1.517	$1.405	$1.308	$1.225	$1.152	$1.088	$1.031	$0.980	$0.934	$0.892	$0.855	$0.820	$0.788	$0.759	6
7			$2.302	$2.045	$1.842	$1.677	$1.541	$1.427	$1.329	$1.244	$1.170	$1.105	$1.047	$0.995	$0.949	$0.906	$0.868	$0.833	$0.801	$0.771	7
8				$2.072	$1.867	$1.700	$1.562	$1.446	$1.347	$1.261	$1.186	$1.120	$1.061	$1.009	$0.961	$0.919	$0.880	$0.844	$0.811	$0.781	8
9					$1.889	$1.720	$1.581	$1.463	$1.363	$1.278	$1.200	$1.133	$1.074	$1.021	$0.973	$0.930	$0.890	$0.854	$0.821	$0.791	9
10						$1.738	$1.597	$1.479	$1.377	$1.290	$1.213	$1.145	$1.085	$1.032	$0.983	$0.940	$0.900	$0.863	$0.830	$0.799	10
11							$1.613	$1.493	$1.390	$1.302	$1.225	$1.156	$1.096	$1.042	$0.993	$0.949	$0.908	$0.872	$0.838	$0.807	11
12								$1.506	$1.403	$1.313	$1.236	$1.167	$1.105	$1.051	$1.002	$0.957	$0.916	$0.879	$0.845	$0.814	12
13									$1.414	$1.324	$1.245	$1.176	$1.114	$1.059	$1.010	$0.965	$0.924	$0.886	$0.852	$0.820	13
14										$1.334	$1.255	$1.185	$1.123	$1.067	$1.017	$0.972	$0.931	$0.893	$0.858	$0.827	14
15											$1.263	$1.193	$1.131	$1.075	$1.024	$0.979	$0.937	$0.899	$0.864	$0.832	15
16												$1.201	$1.138	$1.082	$1.031	$0.985	$0.943	$0.905	$0.870	$0.838	16
17													$1.145	$1.088	$1.037	$0.991	$0.949	$0.911	$0.875	$0.843	17
18														$1.094	$1.043	$0.997	$0.955	$0.916	$0.880	$0.848	18
19															$1.049	$1.002	$0.960	$0.921	$0.885	$0.852	19
20																$1.007	$0.965	$0.926	$0.890	$0.857	20
21																	$0.969	$0.930	$0.894	$0.861	21
22																		$0.935	$0.898	$0.865	22
23																			$0.902	$0.869	23
24																				$0.873	24

ATTACHMENT A Benchmark Cable Rates

PRICE PER CHANNEL for systems with 250 subscribers and 25 or more channels

Weighted and Adjusted for Franchise Fees and Equipment

Total channels on regulated tiers:																
Satellite Channels	25	30	35	40	45	50	55	60	65	70	75	80	85	90	95	100	Satellite Channels
v																	v
0	$0.620	$0.528	$0.460	$0.409	$0.368	$0.335	$0.308	$0.285	$0.266	$0.249	$0.234	$0.221	$0.209	$0.199	$0.190	$0.181	0
5	$0.729	$0.620	$0.541	$0.481	$0.433	$0.394	$0.362	$0.335	$0.312	$0.292	$0.275	$0.260	$0.246	$0.234	$0.223	$0.213	5
10	$0.782	$0.665	$0.580	$0.515	$0.464	$0.423	$0.388	$0.360	$0.335	$0.314	$0.295	$0.278	$0.264	$0.251	$0.239	$0.228	10
15	$0.815	$0.693	$0.604	$0.537	$0.483	$0.440	$0.405	$0.374	$0.349	$0.327	$0.307	$0.290	$0.275	$0.261	$0.249	$0.238	15
20	$0.839	$0.713	$0.622	$0.552	$0.498	$0.453	$0.416	$0.385	$0.359	$0.336	$0.316	$0.299	$0.283	$0.269	$0.256	$0.245	20
25	$0.858	$0.729	$0.636	$0.565	$0.509	$0.463	$0.426	$0.394	$0.367	$0.344	$0.323	$0.305	$0.289	$0.275	$0.262	$0.250	25
30		$0.743	$0.648	$0.575	$0.518	$0.472	$0.434	$0.402	$0.374	$0.350	$0.329	$0.311	$0.295	$0.280	$0.267	$0.255	30
35			$0.658	$0.584	$0.526	$0.479	$0.441	$0.408	$0.380	$0.356	$0.335	$0.316	$0.299	$0.285	$0.271	$0.259	35
40				$0.592	$0.534	$0.486	$0.446	$0.413	$0.385	$0.360	$0.339	$0.320	$0.303	$0.288	$0.275	$0.263	40
45					$0.540	$0.492	$0.452	$0.418	$0.390	$0.365	$0.343	$0.324	$0.307	$0.292	$0.278	$0.266	45
50						$0.497	$0.457	$0.423	$0.394	$0.369	$0.347	$0.327	$0.310	$0.295	$0.281	$0.269	50
55							$0.461	$0.427	$0.397	$0.372	$0.350	$0.331	$0.313	$0.298	$0.284	$0.271	55
60								$0.431	$0.401	$0.375	$0.353	$0.333	$0.316	$0.300	$0.286	$0.274	60
65									$0.404	$0.378	$0.356	$0.336	$0.319	$0.303	$0.289	$0.276	65
70										$0.381	$0.359	$0.339	$0.321	$0.305	$0.291	$0.278	70
75											$0.361	$0.341	$0.323	$0.307	$0.293	$0.280	75
80												$0.343	$0.325	$0.309	$0.295	$0.282	80
85													$0.327	$0.311	$0.296	$0.283	85
90														$0.313	$0.298	$0.285	90
95															$0.300	$0.286	95
100																$0.288	100

PRICE PER CHANNEL for systems with 500 subscribers and 25 or more channels

Weighted and Adjusted for Franchise Fees and Equipment

Total channels on regulated tiers:																
Satellite Channels	25	30	35	40	45	50	55	60	65	70	75	80	85	90	95	100	Satellite Channels
v																	v
0	$0.611	$0.520	$0.453	$0.403	$0.363	$0.330	$0.304	$0.281	$0.262	$0.245	$0.231	$0.218	$0.206	$0.196	$0.187	$0.179	0
5	$0.719	$0.611	$0.533	$0.474	$0.427	$0.388	$0.357	$0.330	$0.308	$0.288	$0.271	$0.256	$0.243	$0.231	$0.220	$0.210	5
10	$0.771	$0.656	$0.572	$0.508	$0.457	$0.417	$0.383	$0.354	$0.330	$0.309	$0.291	$0.274	$0.260	$0.247	$0.236	$0.225	10
15	$0.803	$0.683	$0.595	$0.529	$0.476	$0.434	$0.399	$0.369	$0.344	$0.322	$0.303	$0.286	$0.271	$0.257	$0.245	$0.234	15
20	$0.826	$0.703	$0.613	$0.544	$0.490	$0.447	$0.410	$0.380	$0.354	$0.331	$0.312	$0.294	$0.279	$0.265	$0.253	$0.241	20
25	$0.845	$0.719	$0.627	$0.557	$0.502	$0.457	$0.420	$0.388	$0.362	$0.339	$0.319	$0.301	$0.285	$0.271	$0.258	$0.247	25
30		$0.732	$0.638	$0.567	$0.511	$0.465	$0.427	$0.396	$0.369	$0.345	$0.325	$0.306	$0.290	$0.276	$0.263	$0.251	30
35			$0.648	$0.576	$0.519	$0.472	$0.434	$0.402	$0.374	$0.350	$0.330	$0.311	$0.295	$0.280	$0.267	$0.255	35
40				$0.584	$0.526	$0.479	$0.440	$0.407	$0.379	$0.355	$0.334	$0.315	$0.299	$0.284	$0.271	$0.259	40
45					$0.532	$0.485	$0.445	$0.412	$0.384	$0.359	$0.338	$0.319	$0.303	$0.288	$0.274	$0.262	45
50						$0.490	$0.450	$0.417	$0.388	$0.363	$0.342	$0.323	$0.306	$0.291	$0.277	$0.265	50
55							$0.454	$0.421	$0.392	$0.367	$0.345	$0.326	$0.309	$0.293	$0.280	$0.267	55
60								$0.424	$0.395	$0.370	$0.348	$0.329	$0.311	$0.296	$0.282	$0.270	60
65									$0.398	$0.373	$0.351	$0.331	$0.314	$0.298	$0.284	$0.272	65
70										$0.376	$0.353	$0.334	$0.316	$0.301	$0.287	$0.274	70
75											$0.356	$0.336	$0.318	$0.303	$0.289	$0.276	75
80												$0.338	$0.321	$0.305	$0.290	$0.277	80
85													$0.322	$0.307	$0.292	$0.279	85
90														$0.308	$0.294	$0.281	90
95															$0.295	$0.282	95
100																$0.284	100

ATTACHMENT A Benchmark Cable Rates

PRICE PER CHANNEL for systems with 750 subscribers and less than 25 channels

Weighted and Adjusted for Franchise Fees and Equipment

Satellite Channels	Total channels on regulated tiers: 5	6	7	8	9	10	11	12	13	14	15	16	17	18	19	20	21	22	23	24	Satellite Channels
v																					v
0	$2.539	$2.160	$1.883	$1.673	$1.507	$1.372	$1.261	$1.167	$1.087	$1.018	$0.957	$0.904	$0.857	$0.814	$0.776	$0.742	$0.710	$0.681	$0.655	$0.631	0
1	$2.539	$2.160	$1.883	$1.673	$1.507	$1.372	$1.261	$1.167	$1.087	$1.018	$0.957	$0.904	$0.857	$0.814	$0.776	$0.742	$0.710	$0.681	$0.655	$0.631	1
2	$2.723	$2.316	$2.019	$1.794	$1.616	$1.471	$1.352	$1.251	$1.166	$1.091	$1.027	$0.969	$0.919	$0.873	$0.832	$0.795	$0.761	$0.731	$0.702	$0.676	2
3	$2.836	$2.412	$2.104	$1.868	$1.683	$1.533	$1.408	$1.304	$1.214	$1.137	$1.069	$1.010	$0.957	$0.910	$0.867	$0.828	$0.793	$0.761	$0.732	$0.705	3
4	$2.919	$2.483	$2.165	$1.923	$1.732	$1.578	$1.450	$1.342	$1.250	$1.170	$1.101	$1.039	$0.985	$0.936	$0.892	$0.853	$0.816	$0.783	$0.753	$0.725	4
5	$2.985	$2.539	$2.214	$1.967	$1.772	$1.613	$1.483	$1.372	$1.278	$1.197	$1.126	$1.063	$1.007	$0.957	$0.913	$0.872	$0.835	$0.801	$0.770	$0.742	5
6		$2.586	$2.255	$2.003	$1.804	$1.643	$1.510	$1.398	$1.302	$1.219	$1.147	$1.083	$1.026	$0.975	$0.929	$0.888	$0.850	$0.816	$0.784	$0.755	6
7			$2.291	$2.035	$1.833	$1.669	$1.534	$1.420	$1.322	$1.238	$1.164	$1.100	$1.042	$0.990	$0.944	$0.902	$0.864	$0.829	$0.797	$0.767	7
8				$2.062	$1.857	$1.692	$1.554	$1.439	$1.340	$1.255	$1.180	$1.114	$1.056	$1.004	$0.957	$0.914	$0.875	$0.840	$0.808	$0.778	8
9					$1.880	$1.712	$1.573	$1.456	$1.356	$1.270	$1.194	$1.128	$1.069	$1.016	$0.968	$0.925	$0.886	$0.850	$0.817	$0.787	9
10						$1.730	$1.590	$1.471	$1.370	$1.283	$1.207	$1.140	$1.080	$1.027	$0.978	$0.935	$0.895	$0.859	$0.826	$0.795	10
11							$1.605	$1.486	$1.384	$1.296	$1.219	$1.151	$1.090	$1.037	$0.988	$0.944	$0.904	$0.867	$0.834	$0.803	11
12								$1.499	$1.396	$1.307	$1.229	$1.161	$1.100	$1.046	$0.997	$0.952	$0.912	$0.875	$0.841	$0.810	12
13									$1.407	$1.318	$1.239	$1.170	$1.109	$1.054	$1.005	$0.960	$0.919	$0.882	$0.848	$0.816	13
14										$1.327	$1.249	$1.179	$1.117	$1.062	$1.012	$0.967	$0.926	$0.889	$0.854	$0.823	14
15											$1.257	$1.187	$1.125	$1.069	$1.019	$0.974	$0.933	$0.895	$0.860	$0.828	15
16												$1.195	$1.132	$1.076	$1.026	$0.980	$0.939	$0.901	$0.866	$0.834	16
17													$1.139	$1.083	$1.032	$0.986	$0.944	$0.906	$0.871	$0.839	17
18														$1.089	$1.038	$0.992	$0.950	$0.911	$0.876	$0.844	18
19															$1.044	$0.997	$0.955	$0.916	$0.881	$0.848	19
20																$1.002	$0.960	$0.921	$0.885	$0.853	20
21																	$0.965	$0.926	$0.890	$0.857	21
22																		$0.930	$0.894	$0.861	22
23																			$0.898	$0.865	23
24																				$0.868	24

PRICE PER CHANNEL for systems with 1,000 subscribers and less than 25 channels

Weighted and Adjusted for Franchise Fees and Equipment

Satellite Channels	Total channels on regulated tiers: 5	6	7	8	9	10	11	12	13	14	15	16	17	18	19	20	21	22	23	24	Satellite Channels
v																					v
0	$2.533	$2.154	$1.879	$1.669	$1.503	$1.369	$1.258	$1.164	$1.084	$1.015	$0.955	$0.902	$0.855	$0.812	$0.774	$0.740	$0.708	$0.680	$0.653	$0.629	0
1	$2.533	$2.154	$1.879	$1.669	$1.503	$1.369	$1.258	$1.164	$1.084	$1.015	$0.955	$0.902	$0.855	$0.812	$0.774	$0.740	$0.708	$0.680	$0.653	$0.629	1
2	$2.716	$2.310	$2.015	$1.789	$1.612	$1.468	$1.349	$1.248	$1.163	$1.089	$1.024	$0.967	$0.916	$0.871	$0.830	$0.793	$0.760	$0.729	$0.701	$0.675	2
3	$2.829	$2.406	$2.098	$1.864	$1.679	$1.529	$1.405	$1.300	$1.211	$1.134	$1.067	$1.007	$0.955	$0.907	$0.865	$0.826	$0.791	$0.759	$0.730	$0.703	3
4	$2.912	$2.477	$2.160	$1.919	$1.728	$1.574	$1.446	$1.339	$1.247	$1.167	$1.098	$1.037	$0.983	$0.934	$0.890	$0.851	$0.814	$0.782	$0.751	$0.723	4
5	$2.978	$2.533	$2.209	$1.982	$1.787	$1.609	$1.479	$1.369	$1.275	$1.194	$1.123	$1.060	$1.005	$0.955	$0.910	$0.870	$0.833	$0.799	$0.768	$0.740	5
6		$2.580	$2.250	$1.998	$1.800	$1.639	$1.506	$1.394	$1.299	$1.216	$1.144	$1.080	$1.023	$0.973	$0.927	$0.886	$0.848	$0.814	$0.783	$0.754	6
7			$2.286	$2.030	$1.828	$1.665	$1.530	$1.416	$1.319	$1.236	$1.162	$1.097	$1.039	$0.988	$0.942	$0.900	$0.862	$0.827	$0.796	$0.766	7
8				$2.057	$1.853	$1.687	$1.551	$1.435	$1.337	$1.252	$1.177	$1.112	$1.053	$1.001	$0.954	$0.912	$0.873	$0.838	$0.806	$0.778	8
9					$1.875	$1.708	$1.569	$1.452	$1.353	$1.267	$1.191	$1.125	$1.066	$1.013	$0.966	$0.923	$0.884	$0.848	$0.815	$0.785	9
10						$1.726	$1.586	$1.468	$1.367	$1.280	$1.204	$1.137	$1.077	$1.024	$0.976	$0.933	$0.893	$0.857	$0.824	$0.793	10
11							$1.601	$1.482	$1.380	$1.292	$1.216	$1.148	$1.088	$1.034	$0.986	$0.942	$0.902	$0.865	$0.832	$0.801	11
12								$1.495	$1.392	$1.304	$1.226	$1.158	$1.097	$1.043	$0.994	$0.950	$0.910	$0.873	$0.839	$0.808	12
13									$1.404	$1.314	$1.236	$1.167	$1.106	$1.051	$1.002	$0.958	$0.917	$0.880	$0.846	$0.814	13
14										$1.324	$1.245	$1.176	$1.115	$1.059	$1.010	$0.965	$0.924	$0.886	$0.852	$0.821	14
15											$1.254	$1.184	$1.122	$1.067	$1.017	$0.971	$0.930	$0.893	$0.858	$0.826	15
16												$1.192	$1.130	$1.074	$1.023	$0.978	$0.936	$0.898	$0.864	$0.832	16
17													$1.136	$1.080	$1.030	$0.984	$0.942	$0.904	$0.869	$0.837	17
18														$1.086	$1.036	$0.989	$0.948	$0.909	$0.874	$0.842	18
19															$1.041	$0.995	$0.953	$0.914	$0.879	$0.846	19
20																$1.000	$0.958	$0.919	$0.883	$0.851	20
21																	$0.962	$0.923	$0.888	$0.855	21
22																		$0.928	$0.892	$0.859	22
23																			$0.896	$0.863	23
24																				$0.866	24

ATTACHMENT A Benchmark Cable Rates

PRICE PER CHANNEL for systems with 750 subscribers and 25 or more channels

Weighted and Adjusted for Franchise Fees and Equipment

Satellite Channels	Total channels on regulated tiers: 25	30	35	40	45	50	55	60	65	70	75	80	85	90	95	100	Satellite Channels
v																	v
0	$0.608	$0.517	$0.451	$0.401	$0.361	$0.329	$0.302	$0.280	$0.260	$0.244	$0.229	$0.217	$0.205	$0.195	$0.186	$0.178	0
5	$0.715	$0.608	$0.531	$0.471	$0.424	$0.387	$0.355	$0.329	$0.306	$0.287	$0.270	$0.255	$0.241	$0.229	$0.219	$0.209	5
10	$0.767	$0.652	$0.569	$0.505	$0.455	$0.414	$0.381	$0.353	$0.328	$0.307	$0.289	$0.273	$0.259	$0.246	$0.234	$0.224	10
15	$0.799	$0.679	$0.593	$0.526	$0.474	$0.432	$0.397	$0.367	$0.342	$0.320	$0.301	$0.284	$0.270	$0.256	$0.244	$0.233	15
20	$0.822	$0.699	$0.610	$0.542	$0.488	$0.444	$0.408	$0.378	$0.352	$0.330	$0.310	$0.293	$0.277	$0.264	$0.251	$0.240	20
25	$0.841	$0.715	$0.624	$0.554	$0.499	$0.454	$0.418	$0.387	$0.360	$0.337	$0.317	$0.299	$0.284	$0.270	$0.257	$0.246	25
30		$0.729	$0.635	$0.564	$0.508	$0.463	$0.425	$0.394	$0.367	$0.343	$0.323	$0.305	$0.289	$0.275	$0.262	$0.250	30
35			$0.645	$0.573	$0.516	$0.470	$0.432	$0.400	$0.372	$0.349	$0.328	$0.310	$0.294	$0.279	$0.266	$0.254	35
40				$0.581	$0.523	$0.476	$0.438	$0.405	$0.377	$0.353	$0.332	$0.314	$0.297	$0.283	$0.270	$0.258	40
45					$0.529	$0.482	$0.443	$0.410	$0.382	$0.358	$0.336	$0.318	$0.301	$0.286	$0.273	$0.261	45
50						$0.487	$0.448	$0.414	$0.386	$0.361	$0.340	$0.321	$0.304	$0.289	$0.276	$0.263	50
55							$0.452	$0.418	$0.390	$0.365	$0.343	$0.324	$0.307	$0.292	$0.278	$0.266	55
60								$0.422	$0.393	$0.368	$0.346	$0.327	$0.310	$0.295	$0.281	$0.268	60
65									$0.396	$0.371	$0.349	$0.330	$0.312	$0.297	$0.283	$0.270	65
70										$0.374	$0.352	$0.332	$0.315	$0.299	$0.285	$0.272	70
75											$0.354	$0.334	$0.317	$0.301	$0.287	$0.274	75
80												$0.337	$0.319	$0.303	$0.289	$0.276	80
85													$0.321	$0.305	$0.291	$0.278	85
90														$0.307	$0.292	$0.279	90
95															$0.294	$0.281	95
100																$0.282	100

PRICE PER CHANNEL for systems with 1,000 subscribers and 25 or more channels

Weighted and Adjusted for Franchise Fees and Equipment

Satellite Channels	Total channels on regulated tiers: 25	30	35	40	45	50	55	60	65	70	75	80	85	90	95	100	Satellite Channels
v																	v
0	$0.607	$0.516	$0.450	$0.400	$0.360	$0.328	$0.301	$0.279	$0.260	$0.243	$0.229	$0.216	$0.205	$0.195	$0.186	$0.177	0
5	$0.714	$0.607	$0.529	$0.470	$0.423	$0.386	$0.354	$0.328	$0.305	$0.286	$0.269	$0.254	$0.241	$0.229	$0.218	$0.208	5
10	$0.765	$0.651	$0.567	$0.504	$0.454	$0.413	$0.380	$0.352	$0.328	$0.307	$0.288	$0.272	$0.258	$0.245	$0.234	$0.223	10
15	$0.797	$0.678	$0.591	$0.525	$0.473	$0.431	$0.396	$0.366	$0.341	$0.319	$0.300	$0.284	$0.269	$0.256	$0.244	$0.233	15
20	$0.820	$0.698	$0.608	$0.540	$0.487	$0.443	$0.407	$0.377	$0.351	$0.329	$0.309	$0.292	$0.277	$0.263	$0.251	$0.240	20
25	$0.839	$0.714	$0.622	$0.553	$0.498	$0.453	$0.417	$0.386	$0.359	$0.336	$0.316	$0.299	$0.283	$0.269	$0.256	$0.245	25
30		$0.727	$0.634	$0.563	$0.507	$0.462	$0.424	$0.393	$0.366	$0.343	$0.322	$0.304	$0.288	$0.274	$0.261	$0.250	30
35			$0.644	$0.572	$0.515	$0.469	$0.431	$0.399	$0.372	$0.348	$0.327	$0.309	$0.293	$0.278	$0.265	$0.253	35
40				$0.579	$0.522	$0.475	$0.437	$0.404	$0.377	$0.353	$0.332	$0.313	$0.297	$0.282	$0.269	$0.257	40
45					$0.526	$0.481	$0.442	$0.409	$0.381	$0.357	$0.336	$0.317	$0.300	$0.285	$0.272	$0.260	45
50						$0.486	$0.447	$0.413	$0.385	$0.361	$0.339	$0.320	$0.303	$0.288	$0.275	$0.263	50
55							$0.451	$0.417	$0.389	$0.364	$0.342	$0.323	$0.306	$0.291	$0.278	$0.265	55
60								$0.421	$0.392	$0.367	$0.345	$0.326	$0.309	$0.294	$0.280	$0.268	60
65									$0.395	$0.370	$0.348	$0.329	$0.312	$0.296	$0.282	$0.270	65
70										$0.373	$0.351	$0.331	$0.314	$0.298	$0.284	$0.272	70
75											$0.353	$0.334	$0.316	$0.300	$0.286	$0.274	75
80												$0.336	$0.318	$0.302	$0.288	$0.275	80
85													$0.320	$0.304	$0.290	$0.277	85
90														$0.306	$0.292	$0.279	90
95															$0.293	$0.280	95
100																$0.282	100

ATTACHMENT A Benchmark Cable Rates

PRICE PER CHANNEL for systems with 1,600 subscribers

Weighted and Adjusted for Franchise Fees and Equipment

Satellite Channels v	Total channels on regulated tiers: 5	6	7	8	9	10	11	12	13	14	15	16	17	18	19	20	21	22	23	24	Satellite Channels v
0	$2.527	$2.149	$1.874	$1.665	$1.499	$1.366	$1.255	$1.161	$1.082	$1.013	$0.953	$0.900	$0.853	$0.810	$0.772	$0.738	$0.707	$0.678	$0.652	$0.628	0
1	$2.527	$2.149	$1.874	$1.665	$1.499	$1.366	$1.255	$1.161	$1.082	$1.013	$0.953	$0.900	$0.853	$0.810	$0.772	$0.738	$0.707	$0.678	$0.652	$0.628	1
2	$2.709	$2.304	$2.010	$1.785	$1.608	$1.464	$1.345	$1.245	$1.160	$1.086	$1.022	$0.965	$0.914	$0.869	$0.828	$0.791	$0.758	$0.727	$0.699	$0.673	2
3	$2.822	$2.400	$2.093	$1.859	$1.675	$1.525	$1.401	$1.297	$1.208	$1.131	$1.064	$1.005	$0.952	$0.905	$0.863	$0.824	$0.789	$0.757	$0.728	$0.701	3
4	$2.905	$2.471	$2.155	$1.914	$1.724	$1.570	$1.443	$1.335	$1.244	$1.165	$1.095	$1.034	$0.980	$0.932	$0.888	$0.848	$0.812	$0.780	$0.749	$0.722	4
5	$2.971	$2.527	$2.204	$1.957	$1.763	$1.606	$1.475	$1.366	$1.272	$1.191	$1.120	$1.058	$1.002	$0.953	$0.908	$0.868	$0.831	$0.797	$0.766	$0.738	5
6		$2.574	$2.244	$1.994	$1.796	$1.635	$1.503	$1.391	$1.295	$1.213	$1.141	$1.077	$1.021	$0.970	$0.925	$0.884	$0.846	$0.812	$0.781	$0.752	6
7			$2.280	$2.025	$1.824	$1.661	$1.526	$1.413	$1.316	$1.232	$1.159	$1.094	$1.037	$0.986	$0.939	$0.898	$0.860	$0.825	$0.793	$0.763	7
8				$2.052	$1.848	$1.683	$1.547	$1.432	$1.334	$1.249	$1.174	$1.109	$1.051	$0.999	$0.952	$0.910	$0.871	$0.836	$0.804	$0.774	8
9					$1.870	$1.703	$1.565	$1.449	$1.349	$1.263	$1.188	$1.122	$1.063	$1.011	$0.963	$0.921	$0.882	$0.846	$0.813	$0.783	9
10						$1.722	$1.582	$1.464	$1.364	$1.277	$1.201	$1.134	$1.075	$1.022	$0.974	$0.930	$0.891	$0.855	$0.822	$0.791	10
11							$1.597	$1.478	$1.377	$1.289	$1.213	$1.145	$1.085	$1.031	$0.983	$0.939	$0.900	$0.863	$0.830	$0.799	11
12								$1.491	$1.389	$1.301	$1.223	$1.155	$1.095	$1.041	$0.992	$0.948	$0.907	$0.871	$0.837	$0.806	12
13									$1.400	$1.311	$1.233	$1.165	$1.104	$1.049	$1.000	$0.955	$0.915	$0.878	$0.844	$0.812	13
14										$1.321	$1.242	$1.173	$1.112	$1.057	$1.007	$0.962	$0.922	$0.884	$0.850	$0.819	14
15											$1.251	$1.181	$1.120	$1.064	$1.014	$0.969	$0.928	$0.890	$0.856	$0.824	15
16												$1.189	$1.127	$1.071	$1.021	$0.975	$0.934	$0.896	$0.862	$0.830	16
17													$1.134	$1.078	$1.027	$0.981	$0.940	$0.902	$0.867	$0.835	17
18														$1.084	$1.033	$0.987	$0.945	$0.907	$0.872	$0.840	18
19															$1.039	$0.992	$0.950	$0.912	$0.877	$0.844	19
20																$0.998	$0.955	$0.917	$0.881	$0.848	20
21																	$0.960	$0.921	$0.885	$0.853	21
22																		$0.925	$0.890	$0.857	22
23																			$0.894	$0.860	23
24																				$0.864	24

PRICE PER CHANNEL for systems with 10,000 subscribers

Weighted and Adjusted for Franchise Fees and Equipment

Satellite Channels v	Total channels on regulated tiers: 5	6	7	8	9	10	11	12	13	14	15	16	17	18	19	20	21	22	23	24	Satellite Channels v
0	$2.516	$2.140	$1.866	$1.658	$1.493	$1.360	$1.250	$1.157	$1.077	$1.009	$0.949	$0.896	$0.849	$0.807	$0.769	$0.735	$0.704	$0.675	$0.649	$0.625	0
1	$2.516	$2.140	$1.866	$1.658	$1.493	$1.360	$1.250	$1.157	$1.077	$1.009	$0.949	$0.896	$0.849	$0.807	$0.769	$0.735	$0.704	$0.675	$0.649	$0.625	1
2	$2.698	$2.296	$2.001	$1.778	$1.601	$1.458	$1.340	$1.240	$1.155	$1.082	$1.017	$0.961	$0.910	$0.865	$0.825	$0.788	$0.755	$0.724	$0.696	$0.670	2
3	$2.810	$2.390	$2.085	$1.852	$1.668	$1.519	$1.396	$1.292	$1.203	$1.127	$1.060	$1.001	$0.948	$0.901	$0.859	$0.821	$0.786	$0.754	$0.725	$0.698	3
4	$2.893	$2.461	$2.146	$1.906	$1.717	$1.563	$1.437	$1.330	$1.239	$1.160	$1.091	$1.030	$0.976	$0.928	$0.884	$0.845	$0.809	$0.776	$0.746	$0.719	4
5	$2.959	$2.516	$2.196	$1.949	$1.756	$1.599	$1.469	$1.360	$1.267	$1.186	$1.116	$1.053	$0.998	$0.949	$0.904	$0.864	$0.827	$0.794	$0.763	$0.735	5
6		$2.563	$2.236	$1.985	$1.788	$1.628	$1.496	$1.385	$1.290	$1.208	$1.136	$1.073	$1.017	$0.966	$0.921	$0.880	$0.843	$0.809	$0.777	$0.749	6
7			$2.270	$2.016	$1.816	$1.654	$1.520	$1.407	$1.310	$1.227	$1.154	$1.090	$1.033	$0.981	$0.935	$0.894	$0.856	$0.821	$0.790	$0.760	7
8				$2.044	$1.841	$1.676	$1.540	$1.426	$1.328	$1.243	$1.170	$1.104	$1.047	$0.995	$0.948	$0.906	$0.868	$0.832	$0.800	$0.771	8
9					$1.863	$1.698	$1.559	$1.443	$1.344	$1.258	$1.183	$1.118	$1.059	$1.007	$0.959	$0.917	$0.878	$0.842	$0.810	$0.780	9
10						$1.714	$1.575	$1.458	$1.358	$1.272	$1.196	$1.129	$1.070	$1.017	$0.970	$0.927	$0.887	$0.851	$0.818	$0.788	10
11							$1.590	$1.472	$1.371	$1.284	$1.208	$1.140	$1.081	$1.027	$0.979	$0.935	$0.896	$0.860	$0.826	$0.796	11
12								$1.485	$1.383	$1.295	$1.218	$1.150	$1.090	$1.036	$0.988	$0.944	$0.904	$0.867	$0.834	$0.803	12
13									$1.394	$1.306	$1.228	$1.160	$1.099	$1.045	$0.996	$0.951	$0.911	$0.874	$0.840	$0.809	13
14										$1.315	$1.237	$1.168	$1.107	$1.052	$1.003	$0.958	$0.918	$0.881	$0.847	$0.815	14
15											$1.246	$1.177	$1.115	$1.060	$1.010	$0.965	$0.924	$0.887	$0.852	$0.821	15
16												$1.184	$1.122	$1.067	$1.017	$0.971	$0.930	$0.893	$0.858	$0.826	16
17													$1.129	$1.073	$1.023	$0.977	$0.936	$0.898	$0.863	$0.831	17
18														$1.079	$1.029	$0.983	$0.941	$0.903	$0.868	$0.836	18
19															$1.034	$0.988	$0.946	$0.908	$0.873	$0.841	19
20																$0.993	$0.951	$0.913	$0.877	$0.845	20
21																	$0.956	$0.917	$0.882	$0.849	21
22																		$0.922	$0.886	$0.853	22
23																			$0.890	$0.857	23
24																				$0.861	24

ATTACHMENT A Benchmark Cable Rates

PRICE PER CHANNEL for systems with 1,500 subscribers and 25 or more channels

Weighted and Adjusted for Franchise Fees and Equipment

Satellite Channels	Total channels on regulated tiers: 25	30	35	40	45	50	55	60	65	70	75	80	85	90	95	100	Satellite Channels
v																	v
0	$0.605	$0.515	$0.449	$0.399	$0.359	$0.327	$0.301	$0.278	$0.259	$0.243	$0.228	$0.216	$0.204	$0.194	$0.185	$0.177	0
5	$0.712	$0.605	$0.528	$0.469	$0.422	$0.385	$0.353	$0.327	$0.305	$0.285	$0.268	$0.253	$0.240	$0.228	$0.218	$0.208	5
10	$0.763	$0.649	$0.566	$0.503	$0.453	$0.412	$0.379	$0.351	$0.327	$0.306	$0.288	$0.272	$0.257	$0.245	$0.233	$0.223	10
15	$0.795	$0.676	$0.590	$0.524	$0.472	$0.430	$0.395	$0.365	$0.340	$0.319	$0.300	$0.283	$0.268	$0.255	$0.243	$0.232	15
20	$0.818	$0.696	$0.607	$0.539	$0.486	$0.442	$0.406	$0.376	$0.350	$0.328	$0.309	$0.291	$0.276	$0.262	$0.250	$0.239	20
25	$0.837	$0.712	$0.621	$0.551	$0.497	$0.452	$0.416	$0.385	$0.358	$0.335	$0.316	$0.298	$0.282	$0.268	$0.256	$0.244	25
30		$0.725	$0.632	$0.562	$0.506	$0.461	$0.423	$0.392	$0.365	$0.342	$0.321	$0.303	$0.288	$0.273	$0.261	$0.249	30
35			$0.642	$0.570	$0.514	$0.468	$0.430	$0.398	$0.371	$0.347	$0.326	$0.308	$0.292	$0.278	$0.265	$0.253	35
40				$0.578	$0.521	$0.474	$0.436	$0.403	$0.376	$0.352	$0.331	$0.312	$0.296	$0.281	$0.268	$0.256	40
45					$0.527	$0.480	$0.441	$0.408	$0.380	$0.356	$0.335	$0.316	$0.300	$0.285	$0.271	$0.259	45
50						$0.485	$0.446	$0.412	$0.384	$0.360	$0.338	$0.319	$0.303	$0.288	$0.274	$0.262	50
55							$0.450	$0.416	$0.388	$0.363	$0.342	$0.323	$0.306	$0.291	$0.277	$0.265	55
60								$0.420	$0.391	$0.366	$0.345	$0.325	$0.308	$0.293	$0.279	$0.267	60
65									$0.394	$0.369	$0.347	$0.328	$0.311	$0.295	$0.282	$0.269	65
70										$0.372	$0.350	$0.330	$0.313	$0.298	$0.284	$0.271	70
75											$0.352	$0.333	$0.315	$0.300	$0.286	$0.273	75
80												$0.335	$0.317	$0.302	$0.288	$0.275	80
85													$0.319	$0.304	$0.289	$0.276	85
90														$0.305	$0.291	$0.278	90
95															$0.293	$0.280	95
100																$0.281	100

PRICE PER CHANNEL for systems with 10,000 subscribers and 25 or more channels

Weighted and Adjusted for Franchise Fees and Equipment

Satellite Channels	Total channels on regulated tiers: 25	30	35	40	45	50	55	60	65	70	75	80	85	90	95	100	Satellite Channels
v																	v
0	$0.603	$0.513	$0.447	$0.397	$0.358	$0.326	$0.299	$0.277	$0.258	$0.242	$0.227	$0.215	$0.203	$0.193	$0.184	$0.176	0
5	$0.709	$0.603	$0.526	$0.467	$0.421	$0.383	$0.352	$0.326	$0.303	$0.284	$0.267	$0.252	$0.239	$0.227	$0.217	$0.207	5
10	$0.760	$0.646	$0.564	$0.501	$0.451	$0.411	$0.377	$0.349	$0.325	$0.305	$0.287	$0.271	$0.256	$0.244	$0.232	$0.222	10
15	$0.792	$0.673	$0.587	$0.522	$0.470	$0.428	$0.393	$0.364	$0.339	$0.317	$0.298	$0.282	$0.267	$0.254	$0.242	$0.231	15
20	$0.815	$0.693	$0.604	$0.537	$0.484	$0.440	$0.405	$0.375	$0.349	$0.327	$0.307	$0.290	$0.275	$0.261	$0.249	$0.238	20
25	$0.833	$0.709	$0.618	$0.549	$0.495	$0.450	$0.414	$0.383	$0.357	$0.334	$0.314	$0.297	$0.281	$0.267	$0.255	$0.243	25
30		$0.722	$0.630	$0.559	$0.504	$0.459	$0.422	$0.390	$0.363	$0.340	$0.320	$0.302	$0.286	$0.272	$0.259	$0.248	30
35			$0.639	$0.568	$0.512	$0.466	$0.428	$0.396	$0.369	$0.346	$0.325	$0.307	$0.291	$0.276	$0.264	$0.252	35
40				$0.576	$0.518	$0.472	$0.434	$0.402	$0.374	$0.350	$0.329	$0.311	$0.295	$0.280	$0.267	$0.255	40
45					$0.525	$0.478	$0.439	$0.406	$0.379	$0.354	$0.333	$0.315	$0.298	$0.284	$0.270	$0.258	45
50						$0.483	$0.444	$0.411	$0.383	$0.358	$0.337	$0.318	$0.301	$0.287	$0.273	$0.261	50
55							$0.448	$0.415	$0.386	$0.362	$0.340	$0.321	$0.304	$0.289	$0.276	$0.264	55
60								$0.418	$0.390	$0.365	$0.343	$0.324	$0.307	$0.292	$0.278	$0.266	60
65									$0.393	$0.368	$0.346	$0.327	$0.310	$0.294	$0.280	$0.268	65
70										$0.371	$0.349	$0.329	$0.312	$0.296	$0.283	$0.270	70
75											$0.351	$0.331	$0.314	$0.299	$0.285	$0.272	75
80												$0.334	$0.316	$0.300	$0.286	$0.274	80
85													$0.318	$0.302	$0.288	$0.275	85
90														$0.304	$0.290	$0.277	90
95															$0.291	$0.278	95
100																$0.280	100

SAMPLE FORM FORM ONLY--NOT APPROVED BY OMB

Instructions for identifying the appropriate benchmark rate from the tables in Attachment A:

1. Each table is split between two pages. For example, the table for 50 subscribers has a first page showing the benchmark rate for 5-24 channels and 0-24 satellite channels. The second page for the table with 50 subscribers shows the benchmark rate for 25-100 channels and 0-100 satellite channels. Select the table with the number of subscribers closest to the number of subscribers on your system. Note that all systems with 10,000 or more subscribers will use the tables for systems with 10,000 subscribers.

2. If the total number of channels on the regulated tiers and the total number of satellite channels on those regulated tiers for your community unit equals the channels displayed in the selected table, use the indicated benchmark rate per channel.

3. If either the total number of channels on the regulated tiers or the total number of satellite channels on those regulated tiers for your community unit does not equal the channels displayed in the selected table, you may determine your benchmark rate per channel be using the Commission's formula, or you can perform one the following calculations.

(a) If the total number of satellite channels on the regulated tiers equals the satellite channels (rows), but the total number of channels on the regulated tiers does not equal the total channels (columns), you must do the following calculation:

Go to the row with your number of satellite channels. Go across the row until you reach the rates for the next fewer and next greater total number of channels than on your community unit. Subtract the lower rate per channel from the higher rate per channel. Divide this difference by 5 to obtain the per channel rate increment. For each channel on your community unit that is greater than the number of channels displayed in the table, subtract the incremental per channel rate from the rate per channel in the box with the next fewer number of total channels to obtain the benchmark rate per channel.

For example, consider a community unit with 50 subscribers on the system, 10 satellite channels, and 27 channels in total. For 10 satellite channels and 25 total channels the benchmark rate per channel (from the table) is $0.880. The benchmark rate per channel for 10 satellite channels and 30 total channels is $0.748 (from the table). The difference between these two benchmark rates is $0.132. The per channel rate increment is $0.026 ($0.132/5 = $0.026 per channel). The benchmark rate per channel for this community unit is obtained by subtracting two times $0.026 from

$0.880. Thus, the benchmark rate per channel for this community unit is $0.828 =($0.880 - (2 x $0.026)).

(b) If the total number of channels on the regulated tiers equals the total channels (columns) but the total number of satellite channels on the regulated tiers does not equal the total satellite channels (rows), you must do the following calculation:

Go to the column with your number of total channels. Go down the column until you reach the rates for the next fewer and next greater total number of satellite channels than on your community unit. Subtract the lower rate per channel from the higher rate per channel. Divide this difference by 5 to obtain the per channel rate increment. For each satellite channel on your community unit that is greater than the number of channels displayed in the table, add the incremental per channel rate to the rate per channel in the box with the next fewer number of total channels to obtain the benchmark rate per channel.

For example, consider a community unit with 50 subscribers on the system, 12 satellite channels, and 30 channels in total. For 10 satellite channels and 30 total channels the benchmark rate per channel (from the table) is $0.748. The benchmark rate per channel for 15 satellite channels and 30 total channels is $0.779 (from the table). The difference between these two benchmark rates is $0.031. The per channel rate increment is $0.0062 ($0.031/5 = $0.0062 per channel). The benchmark rate per channel for this community unit is obtained by adding two times $0.0062 to $0.748. Thus, the benchmark rate per channel for this community unit is $0.760 = ($0.748 + (2 x $0.0062)).

c) If both the total number of satellite channels and the total number of channels on the regulated tiers fall between the channels on the table, you must do the following calculation:

Go to the two rows of satellite channels that are below and above, respectively, your number of satellite channels. Go across the rows until you reach the rates for the next fewer and next greater total number of channels than on your community unit. Compute rates per channel as per step (a) above separately for the exact number of total channels for the two rows of satellite channels. Repeat step (b) above using these two new rates per channel for the total number of channels to obtain the benchmark rate per channel.

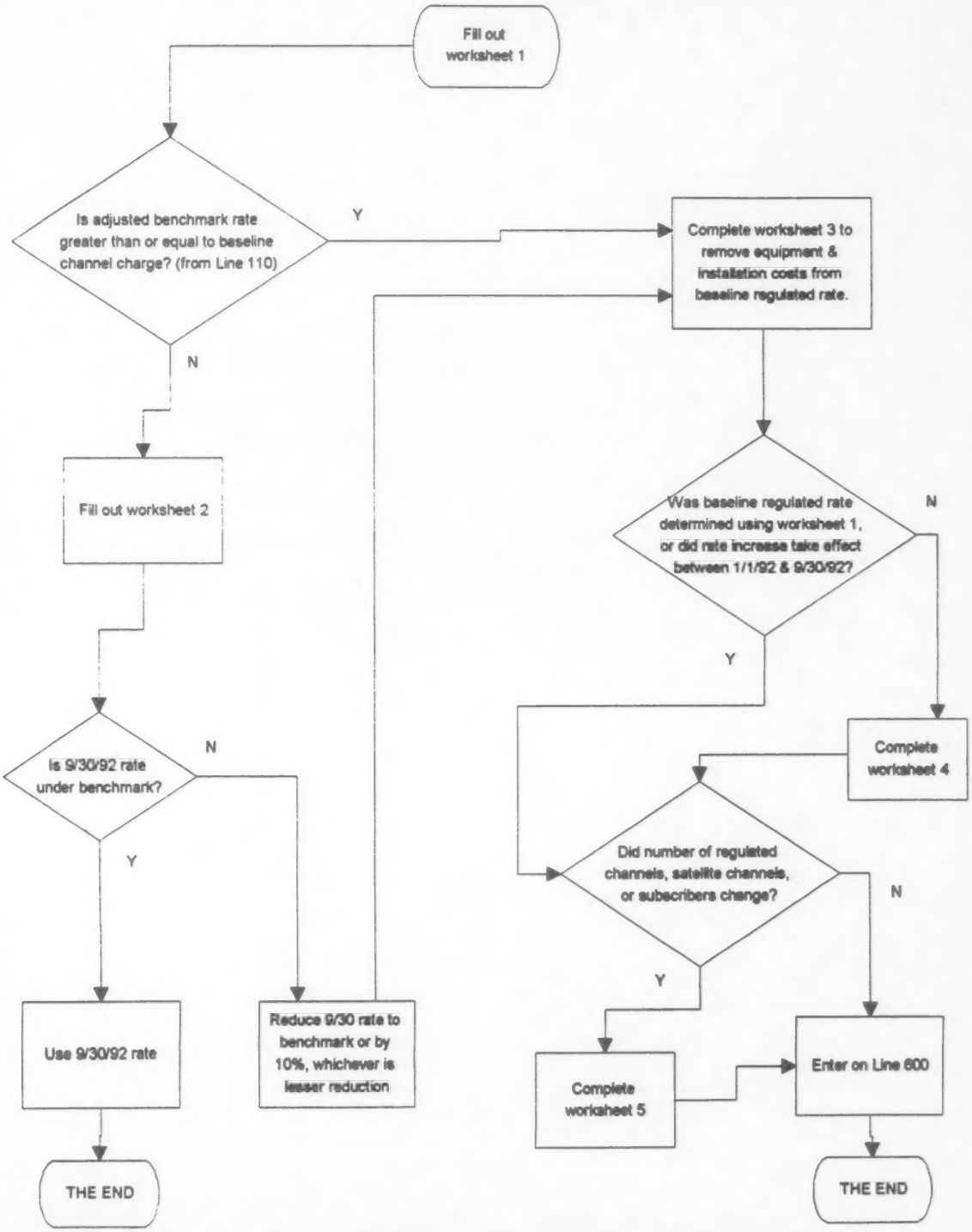
For example, consider a community unit with 50 subscribers on the system, 12 satellite channels, and 27 channels in total. Perform step (a) above for both 10 and 15 satellite channels. For 10 satellite channels and 25 total channels the benchmark rate per channel (from the table) is $0.880. The benchmark rate per channel for 10 satellite channels and 30 total channels is $0.748 (from the

table). The difference between these two benchmark rates is $0.132. The per channel rate increment is $0.026 ($0.132/5 = $0.026 per channel). Therefore, the 10 satellite and 25 total channel rate of $0.880 is reduced by subtracting two times $0.026 from $0.880 to arrive at $0.828 ($0.880 - (2 x $0.026)) for a 10 satellite channel, 27 total channel benchmark rate. The same exercise is performed for 15 satellite channels at 25 and 30 total channels to arrive at a 15 satellite channel benchmark at 27 total channels. At 15 satellite and 25 total channels the price per channel is $0.916. At 15 satellite and 30 total channels the price per channel is $0.779. The difference is $0.137 (or $0.137/5 = $0.027/channel). So at 27 total channels, the rate for 15 satellite channels is $0.916 minus $0.054 (twice $0.027) or $0.862.

We now have a range of $0.828/channel for 10 satellite channels and 27 total channels and $0.862 for 15 satellite also at 27 total channels. We perform step (b) above using these new exact values for 27 total channels. The difference between $0.828/channel and $0.862/channel at 27 total channels is $0.034 (or $0.034/5 = $0.007/channel). For 12 satellite channels we add $0.014 (twice $0.007) to $0.828/channel to equal the benchmark rate of $0.842.

Attachment B

DETERMINATION OF MAXIMUM ALLOWABLE BENCHMARK RATE


Fill out worksheet 1
Is adjusted benchmark rate greater than or equal to baseline channel charge? (from Line 110)
Y
N
Complete worksheet 3 to remove equipment & installation costs from baseline regulated rate.
Fill out worksheet 2
Was baseline regulated rate determined using worksheet 1, or did rate increase take effect between 1/1/92 & 9/30/92?
N
Y
Is 9/30/92 rate under benchmark?
N
Y
Complete worksheet 4
Did number of regulated channels, satellite channels, or subscribers change?
N
Y
Use 9/30/92 rate
Reduce 9/30 rate to benchmark or by 10%, whichever is lesser reduction
Complete worksheet 5
Enter on Line 600
THE END
THE END

FCC FORM 393 -- PART III

WORKSHEETS AND INSTRUCTIONS FOR CALCULATING EQUIPMENT AND INSTALLATION CHARGES

FCC FORM 393 -- PART III

WORKSHEET FOR CALCULATING EQUIPMENT AND INSTALLATION CHARGES

Cable Operator Name: Franchise Authority:	Community Unit ID (CUID): Basic Tier Cable Programming (Circle One)	Date:

STEP A. Hourly Service Charge

Line		
1.	Annual Cost of Maintenance and Installation of Cable Facilities and Services Excluding Purchase Cost of Customer Equipment (Box 1 of Schedule A + Box 2 of Schedule B)	$_____
2.	Customer Equipment and Installation Percentage	_____%
3.	Annual Equipment Basket Costs, Excluding Cost of Leased Equipment (Line 1 x Line 2)	$_____
4.	Total Labor Hours for Maintenance and Installation of Customer Equipment and Service	_____hrs.
5.	Hourly Service Charge (HSC) (Line 3 / Line 4)	$_____/hr.

STEP B. Installation Charge

Line		
6.	Uniform HSC for All Installations (Insert amount from Line 5)	$_____
	OR	
7.	Average HSC by Installation Type (See schedule D for average installation charges calculations):	
	a. Unwired Home Installation	$_____
	b. Prewired Home Installation	$_____
	c. Additional Connection Installation at Time of Initial Installation	$_____
	d. Additional Connection Installation Requiring Separate Installation	$_____
	e. Other Installations (specify):	
	Item 1.	$_____
	Item 2.	$_____
	Item 3.	$_____
	Item 4.	$_____

Example Form -- Not Approved by OMB -- Do Not Use for Official Submissions -- Ver. 5/3/93

Cable Operator Name:	Community Unit ID (CUID):	Date:
Franchise Authority:	Basic Tier Cable Programming (Circle One)	

STEP C. Charges for Leased Remotes
(Calculate Separately for Each Significantly Different Type)

Line		
8.	Annual Capital Costs (Col. J of Schedule C)	$_____
9.	Total Maintenance/Installation Hours	_____hrs.
10.	Total Maintenance/Installation Cost (Line 5 x Line 9)	$_____
11.	Total Cost of Remote (Line 8 + Line 10)	$_____
12.	Number of Units in Service (Col. I of Schedule C)	_____
13.	Unit Cost (Line 11 / Line 12)	$_____
14.	Rate per Month (Line 13 / 12 months)	$_____/mo

STEP D. Charges for Leased Converter Boxes
(Calculate Separately for Each Significantly Different Type)

Line		
15.	Annual Capital Costs (Col. J of Schedule C)	$_____
16.	Total Maintenance/Installation Hours	_____hrs.
17.	Total Maintenance/Installation Costs (Line 5 x Line 16)	$_____
18.	Total Cost of Converter Box (Line 15 + Line 17)	$_____
19.	Number of Units in Service (Col. I of Schedule C)	_____
20.	Unit Cost (Line 18 / Line 19)	$_____
21.	Rate per Month (Line 20 / 12 months)	$_____/mo.

STEP E. Charges for Other Leased Equipment

Line		
22.	Annual Capital Costs (Col. J of Schedule C)	$_____
23.	Total Maintenance/Installation Hours	_____hrs.
24.	Total Maintenance/Installation Costs (Line 5 x Line 23)	$_____
25.	Total Cost of Other Equipment Item (Line 22 + Line 24)	$_____
26.	Number of Units in Service or Number of Subscribers (Col. I of Schedule C)	_____
27.	Unit Cost (Line 25 / Line 26)	$_____
28.	Rate per Month (Line 27 / 12 months)	$_____/mo.

Cable Operator Name:	Community Unit ID (CUID):	Date:
Franchise Authority:	Basic Tier Cable Programming (Circle One)	

STEP F. Charges for Changing Service Tiers or Equipment

Line		
29.	Nominal Charge for Changing Service Tiers	$_____
	OR	
30.	Uniform HSC for Changing Service Tiers (Insert amount from Line 5)	$_____
	OR	
31.	Average Rate for Changing Service Tiers (Line 5 x Average Hours to Change Tiers)	$_____

FCC FORM 393, PART III, INSTRUCTIONS

Instructions for Equipment and Installation Charges

These instructions will take you step-by-step through the calculations needed to determine the maximum rates you may charge for regulated equipment and installation. You should submit this form to the local franchising authority to calculate charges for equipment and service installation used to receive basic tier service. Commission rules define this equipment as any customer equipment that is used to receive the basic service tier, even if that equipment is also used to receive other cable programming service tiers or unregulated services. This form will also be used by the Commission in reviewing complaints concerning charges for equipment and installation used to receive cable programming services.[1] Commission rules define equipment and installation used to receive cable programming services as all equipment and installation on a subscriber's premises that is used to receive either: (1) exclusively cable programming services; or (2) both cable programming services and pay per channel or pay per view programming.

You should complete this form using financial data from the company's general ledger and subsidiary records maintained in accordance with generally accepted accounting principles (as required in FCC accounting instructions in 47 C.F.R. § 76.924).

Step A: Calculate the Hourly Service Charge.

The Hourly Service Charge (HSC) is designed to recover the costs of service installation and equipment maintenance. To calculate the HSC, you will add your annual capital costs plus expenses for equipment necessary for the maintenance of customer equipment and the installation of basic tier service, excluding the capital costs of customer equipment. You will divide the total by the total number of person-hours spent in those activities over the past year. The HSC will be used as a factor in developing charges for installation and monthly lease of individual pieces of equipment.

Line 1. List your the total annual capital costs plus expenses for equipment necessary for the maintenance and installation of cable facilities and cable services. Line 1 excludes the purchase cost of customer equipment because these costs will be recovered in the charge for the specific categories of equipment in Steps C, D, and E, below. You should determine the total annual capital costs and expenses by adding Box 1 of Schedule A (total annual capital costs) and Box 2 of Schedule B (total annual expenses, excluding depreciation). Instructions for completing these schedules are attached to the schedules.

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[1] For simplicity, the remainder of this form will refer to equipment and installation for basic tier service. When calculating charges for equipment and installation related to cable programming services, substitute the appropriate numbers relating to that equipment and installation.

Line 2. List the percentage of the costs and expenses entered in line 1 that is used for maintenance of customer equipment and customer installations used to receive the basic service tier. Please attach an explanation of how you arrived at this allocation.

Line 3. Multiply line 1 by line 2. The result will be your total annual capital costs and expenses, excluding purchase costs for customer equipment, incurred for maintenance of customer equipment and service installation used to receive the basic service tier.

Line 4. Calculate the total number of person hours that were spent on maintenance of customer equipment and service installation in the 12 month period ending at the close of the most recent accounting period. For new equipment, use an estimate. Attach an explanation or study for your calculations.

Line 5. Divide line 3 by line 4. The result is the HSC.

Step B. Calculate the Charge for Installation.

Step B allows an operator to elect whether to use a per hour rate for all installations or to use several average installation rates.

Line 6. If you elect to charge an hourly rate for installations, the rate shall be the HSC. Write the HSC of line 5 in line 6.

Line 7. If you choose to develop average installation rates, the rates shall be determined using Schedule D. Write the charges from Schedule D in lines 7a-7e (add more lines if necessary).

Step C. Calculate the Charge for Leased Remotes.

The rental charge for a remote control unit is designed to recover the costs of providing and maintaining that type of remote control unit leased by a subscriber and includes a reasonable profit. Commission rules require cable operators to calculate charges for each significantly different type of remote control unit. Therefore, you must repeat the calculations in lines 8-14 for each type of remote listed in Schedule C. Attach extra sheets as needed.

Line 8. List the total annual capital costs (depreciation, return on investment, and applicable taxes) of this type of remote. This amount is taken from the appropriate line of Column J on Schedule C (the line number will differ depending on the number of different types of remotes offered by the cable system). Instructions for completing Schedule C are attached to the schedules.

Line 9. List the number of hours you spend per year repairing and servicing this type of remote. Attach an explanation or study for your calculations.

Line 10. Multiply line 9 by the HSC listed in line 5. The result is the total annual cost for repairing and servicing this type of remote.

Line 11. Add line 8 and line 10. The sum is the total annual cost for this type of remote.

Line 12. List the total number of this type of remote that were in service on the last day you closed your books.

Line 13. Divide line 11 by line 12. The result is the annual unit cost of this type of remote.

Line 14. Divide line 13 by the number 12. The result will be the monthly cost of this type of remote. Line 14 will be the maximum monthly lease charge for this type of remote.

Step D. Calculate the Charge for Leased Converter Boxes.

The rental charge for a converter box is designed to recover the costs of providing and maintaining that type of converter box leased by a subscriber and includes a reasonable profit. Commission rules require an operator to calculate charges for each significantly different type of converter box. For example, an addressable converter box and a converter box that acts solely as a tuner would be considered significantly different. Therefore, you must repeat the calculations in lines 15-21 for each type of converter box listed in Schedule C. Attach extra sheets as needed.

Line 15. List the total annual capital costs (depreciation, return on investment, and applicable taxes) of this type of converter box. This amount is taken from the appropriate line of Column J on Schedule C (the line number will differ depending on the number of different types of converter boxes offered by the cable system).

Line 16. List the number of hours you spend per year repairing and servicing this type of converter box. Attach an explanation or study for your calculations.

Line 17. Multiply line 16 by the HSC listed in line 5. The result is the total annual cost for repairing and servicing this type of converter box.

Line 18. Add line 15 and line 17. The sum is the total annual cost for this type of converter box.

Line 19. List the total number of this type of converter box that were in service on the last day you closed your books.

Line 20. Divide line 18 by line 19. The result is the annual unit cost of this type of converter box.

Line 21. Divide line 20 by the number 12. The result will be the monthly cost of this type of converter box. Line 21 will be the maximum monthly lease charge for this type of converter box.

Step E. Calculate the Charge for Other Leased Equipment.

The rental charge for other equipment is designed to recover the costs of providing and maintaining that equipment leased by a subscriber and includes a reasonable profit. Other equipment would include, for example, cable home wiring. An operator is permitted, but not required to calculate charges for each significantly different type of other equipment. An operator choosing to establish charges for different types of other equipment must repeat the calculations in lines 22-28 for each type of other equipment listed in Schedule C. Attach extra sheets as needed.

Line 22. List the total annual capital costs (depreciation, return on investment, and applicable taxes) of other leased equipment. This amount is taken from the appropriate line of Column J on Schedule C (the line number will differ depending on the number of different types of other equipment offered by the cable system).

Line 23. List the number of hours you spend per year repairing and servicing this other equipment. Attach an explanation or study for your calculations.

Line 24. Multiply line 23 by the HSC listed in line 5. The result is the total annual cost for repairing and servicing other equipment.

Line 25. Add line 22 and line 24. The sum is the total annual cost for other equipment.

Line 26. List either the total number of units for this type of other equipment or the number of subscribers using this equipment, whichever is applicable, that were in service or using this equipment on the last day you closed your books.

Line 27. Divide line 25 by line 26. The result is the annual unit cost of other equipment.

Line 28. Divide line 27 by the number 12. The result will be the monthly cost of other equipment. Line 28 will be the maximum monthly lease charge for other equipment.

Step F: Charge for Changing Service Tiers or Equipment.

Charges for changing service tiers effected solely by coded entry on a computer terminal or by other similarly simple method shall be nominal. Enter your nominal charge in **Line 29.** However, to prevent an uneconomic level of churn, an operator may propose an escalating scale of charges for customers changing service tiers more than two times in one year. If you choose to adopt such increased charges, please attach a list of the charges and an explanation of why these charges are reasonable. This list should also be attached to the cover sheet in Part I of this form.

Charges for changing service tiers or equipment that involve more than the simple methods described above, shall be at actual cost. To calculate this charge, you may use one of the two alternatives below.

Line 30. If you elect to charge an hourly rate for changing service tiers, the rate shall be the HSC. Write the HSC of line 5 in line 30.

Line 31. If you choose to develop an average rate for changing service tiers, multiply the HSC by the average time such changes take. Enter the result in line 31.

Notes:

1. Charge for Additional Connections.

Section 76.923(h) of the Commission's rules state that an operator shall recover the costs of installation of and equipment used with additional connections through the related equipment and installation charges. Thus, Step B calculates installation charges for additional connections, and Steps C, D, and E are used to calculate the charges for all customer equipment, regardless of whether the equipment is used in conjunction with primary or additional connections.

An operator may, however, recover additional programming costs and the costs of necessary signal boosters located on a customer's premises, if any, associated with the additional connection as a separate monthly charge for additional connections. The charge for additional programming shall be the additional costs of that programming to the operator. The charge for any signal boosters shall be calculated separately using instructions Step E for other customer equipment. Attach extra calculations to the Equipment and Installation Form and cover sheet as necessary.

SCHEDULE A

CAPITAL COSTS OF SERVICE INSTALLATION & MAINTENANCE OF EQUIPMENT

A Equipment	B Gross Book	C Accumulated Depreciation	D Deferred Taxes	E Net Book B-(C+D)	F Return on Investment	G Taxes		H Current Provision for Depreciation	I TOTAL (add E, F, G)
						Federal Income Tax	State Income Tax		
Vehicles									
Tools									
Maintenance Facility									
Other (specify)									
Other (specify)									
TOTAL									

Box 1

6126

SCHEDULE B

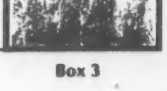
ANNUAL OPERATING EXPENSES FOR SERVICE INSTALLATION & MAINTENANCE OF EQUIPMENT (Excluding Depreciation)

Annual Operating Expenses	
Salaries & Benefits	
Supplies	
Utilities	
Other Taxes	
Other (Specify)	
Other (Specify)	
TOTAL	

Box 2

SCHEDULE C

CAPITAL COSTS OF LEASED CUSTOMER EQUPMENT

A Equipment	B Gross Book	C Accumulated Depreciation	D Deferred Taxes	E Net Book B-(C+D)	F Return on Invetment	G Taxes		H Annual Depreciation Expense Provision on Invetment	I Total # of Units in Service	J Total Add F, G, H
						Federal Income Tax	State Income Tzx			
Remote 1										
Remote 2										
Converter Box 1										
Converter Box 2										
Other Equipment										
TOTAL										

Box 3

6128

SCHEDULE D

AVERAGE INSTALLATION CHARGES

a. Unwired Home Installation:

1. Average Hours per Installtion (attach explanation) _____

2. Unwired Home Installation Charge (Line a1 x HSC) $_____

b. Prewired Home Installation:

1. Average Hours per Installation (attach explanation) _____

2. Prewired Home Installation Charge (Line b1 x HSC) $_____

c. Additional Connection Installation at Time of Initial Installation:

1. Average Hours per Additional Connection (attach explanation) _____

2. Additional Connection - Initial Installation Charge (Line c1 x HSC) $_____

d. Additional Connection Installation after Initial Installation:

1. Average Hours per Additional Connection (attach explanation) _____

2. Additional Connection - Separate Installation Charge (Line d1 x HSC) $_____

e. Other Installations (by Item Type):

Item 1. (Specify)

1. Average Hours per Installation (attach explanation) _____

2. Item 1 Installation Charge (Line e1 x HSC) $_____

Add additional items as needed.

NOTE: For HSC (Hourly Service Charge) use amount from Line 5 of the Equipment and Installation Charges Form

FCC FORM 393, PART III

INSTRUCTIONS FOR SCHEDULE A
(ANNUAL CAPITAL COSTS ASSOCIATED WITH MAINTENANCE AND INSTALLATION OF CABLE EQUIPMENT)

1. Schedule A computes the capital costs for cable equipment necessary for maintenance and installation of cable facilities and cable service, not including the annual capital costs of customer premises equipment such as remotes and converter boxes included in Schedule C (see instructions below).

2. Column A lists the types of equipment for which capital cost information is required, such as vehicles and tools, and including other equipment used for installation and maintenance, which you may specify on the form. Maintenance facility refers to buildings, tools, and equipment necessary for the repair and maintenance of other vehicles and equipment.

3. Column B requires you to state the gross book value for the categories listed in Column A as of the date you last closed your books.

4. Column C requires you to give the accumulated depreciation for each category of equipment on the gross book values listed in Column B as of the same date used for Column B entries.

5. Column D requires you to give the deferred tax balance associated with the plant categories listed in Column A (Generally, such amounts result from the use of faster depreciation write-offs for tax purposes than for financial reporting purposes).

6. Column E requires you to give the net book values for each category in Column A (Column B minus the sum of Columns C plus D).

7. Column F allows for a reasonable return to be calculated by multiplying the investment listed in Column E by a reasonable rate of return. The Report and Order states that the Commission will consider up to 11.25% as a not unreasonable rate of return. If you choose a rate of return that is higher than 11.25%, you must attach a justification for your choice.

8. Column G requires you to list the federal and state income taxes you would be required to pay for each category of return in Column F. (Apply your federal and state tax rate to the return on investment in Column F).

9. Column H requires you to list the annual depreciation expense for each category of equipment in Column A.

10. Column I requires you to add Columns F, G, and H.

11. Add the totals in Column I and enter in Box 1.

INSTRUCTIONS FOR SCHEDULE B
(ANNUAL OPERATING EXPENSES ASSOCIATED WITH MAINTENANCE AND INSTALLATION OF CABLE EQUIPMENT, EXCLUDING DEPRECIATION)

Schedule B includes all annual operating expenses, excluding depreciation, for service installation and maintenance of equipment for the 12 months ending as of the date you last closed your books. This schedule requires you to list your operating expenses, including salary and benefits, supplies, utilities, other taxes and any other applicable expenses. Other expenses included must be identified. The total is the sum of all operating expenses and should be entered in Box 2.

INSTRUCTIONS FOR SCHEDULE C
(CAPITAL COSTS OF CUSTOMER EQUIPMENT)

1. Schedule C includes the purchase cost of leased customer equipment, including acquisition price and incidental costs such as sales tax, financing and storage up to the time it is provided to the subscriber.

2. In Column A list all customer equipment for which there is a separate charge, including different models of remote control units, different types of converter boxes, and other equipment. List separately each type of other equipment for which you plan to develop a separate charge.

3. In Column B give the gross book value of the listed equipment. The gross book value includes the cost of spare customer equipment that the operator keeps on hand for new customers or as replacement for broken equipment.

4. List the accumulated depreciation in Column C for each equipment category in Column A.

5. Column D requires you to give the deferred tax balance associated with the plant categories listed in Column A (Generally, such amounts result from the use of faster depreciation write-offs for tax purposes than for financial reporting purposes).

6. Column E requires you to give the net book values for each category in Column A (Column B minus the sum of Columns C plus D).

7. Column F multiplies a reasonable rate of return by the investment listed in Column E. The Report and Order states that the Commission will consider up to 11.25% as a not unreasonable rate of return. If you choose a rate of return that is higher than 11.25%, you must attach a justification for your choice.

8. Column G requires you to list the federal and state income taxes you would be required to pay for each category of return in Column F. (Apply your federal and state tax rate to the return on investment in Column F).

9. Column H requires you to list the annual depreciation expense for each category of equipment in Column A.

10. Column I requires you to give the total number of units in service for leased remotes and converter boxes. For other leased equipment, list the total number of units in service or the total number of subscribers using this equipment, whichever is appropriate.

11. Column J requires you to add Columns F, G, and H.

12. Add the totals in Column J and enter in Box 3.

INSTRUCTIONS FOR SCHEDULE D

Schedule D is used only if you choose to charge averaged rates for service installation. If choosing this option, you must calculate an averaged rate for several types of installations.

Schedule D calculates four separate averages charges that the Commission requires for an operator choosing this option. These average charges are for: (a) installations of unwired homes; (b) installations of already wired homes; (c) installations of additional connections at the time of initial installation; and (d) installations of additional connections after initial service installation. An operator may calculate, using the same methodology, average charges for other specific types of installations such as those requiring extra long drops to the home. Add additional lines as needed.

To calculate an average installation charge, multiply the Hourly Service Charge (HSC) by the average number of hours it takes for that type of installation. Attach an explanation or study for how you arrived at the average time for that type of installation.

APPENDIX E -- SURVEY RESULTS: TECHNICAL ISSUES

APPENDIX E

Survey Results: Technical Issues

1. On December 10, 1992, the Commission adopted an Order, in MM Docket No. 92-266, 8 FCC Rcd 226, which required certain selected cable system operators to provide subscriber rates and other information for their cable community units and the cable systems to which they belong.

Data Collection

2. Survey Methodology. The Commission mailed 748 survey forms to a range of cable community units.[1] The components of the survey were: 1) a 1-percent random sample of cable community units ("random sample");[2] 2) cable community units where there appeared to be competition from at least one other multichannel video service provider ("overbuild sample");[3] 3) community units in low

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[1] A cable community unit is a cable television system, or portion of a cable television system, that operates within a separate community or municipal entity. See 47 CFR §76.5(dd). A cable television system is defined in 47 CFR §76.5(a).

[2] A 1 percent random sample of 300 cable community units was drawn from the universe of active cable community units (29,963) in the Commission's data base as of December 14, 1992. The procedure used is as follows: 1) in order to initialize the random number generator described below, forty seed numbers were randomly selected by Commission staff; 2) a list of random numbers between 1 and 29,963 was created by a computerized random number generator based on the encryption standard of the National Institute of Standards and Technology (NIST); 3) at the same time, a list of the 29,963 community units was created from the Commission's data base, alphabetized by state, and within each state, ordered in seriatim, by the community unit identification numbers (CUIDs); and 4) Commission staff matched the first 300 randomly selected numbers to 300 community units from the list described in (3) above.

[3] To identify cable systems competing with other systems, a list of cable overbuilds was taken from the Cable TV Overbuild Census in Paul Kagan Associates, Inc., "Cable TV Franchising," April 30, 1992. In addition, a list of overbuild systems as of October 3, 1992, from Nielsen Media Research, was provided by NCTA. Systems that appeared on either list were included in this sample. To identify cable systems facing competition from wireless cable systems, a list of wireless cable systems in operation or under construction in 1992 was obtained from the Wireless Cable Association. A list of multichannel wireless cable systems as of December 31, 1990 was also obtained from Paul Kagan Associates data. On the assumption that a wireless cable system that began operation after 1990 was unlikely to have penetration greater than 15 percent in September 1992, wireless cable systems were

penetration franchise areas (those expected to have less than 30 percent cable penetration) ("small sample")[4]; and 4) cable community units in the 100 largest cable systems ("top-100 sample").[5] A small number of surveyed community units fell into two categories.

3. Information solicited in the survey. The survey sought information about (i) the community unit selected, (ii) the cable system to which the community unit belongs, and (iii) one other community unit in the same cable system.[6]

4. Information requested concerning the cable system included identification and location data; a list of all franchise areas served by the system, their zip codes, FCC community unit identification (CUID) numbers, and franchise authorities; a range of descriptive data for the system including, among other things, households passed by the cable system, subscribers, line miles of distribution plant, and whether it was part of an MSO; system annual revenue for the latest complete fiscal year including separate information for the basic tier, other tiers, pay, pay-

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considered only if they appeared on both lists. Cable systems in the same markets as these wireless systems were identified from the Cable TV Factbook. These cable systems were included in the survey if their ownership was different from that of the wireless cable system in the market. These lists of systems were compared with the FCC's list of cable system community units to determine the CUID code and the mailing address of the appropriate community unit. Where the systems could not be identified in the FCC's list, and addresses were not provided in the original list, addresses were found in the Cable TV Factbook.

[4] To identify cable systems with less than 30 percent penetration as of October 3, 1992, a list from Nielsen Media Research was provided by NCTA. Where these systems could not be identified in the FCC's list, and addresses were not provided in the original list, addresses were found in the Cable TV Factbook.

[5] The list of 100 largest systems was taken from the Cable TV Factbook list of "Top 100 Systems." The community unit for each system was selected by choosing the community unit -- as recorded in the Commission's data base -- located in the same city as the cable system's mailing address; where no such community unit was found, a nearby community unit was selected.

[6] We asked respondents to choose as the second community unit the community unit, other than the one to which the survey was addressed, that had the most subscribers and faced competition; if no community unit faced competition, the second community unit was to be the one with the most subscribers (and different prices and channel lineups, if possible).

per-view, and advertising, and information on the extent of competition in each of the franchise areas served by the system.

5. Additional descriptive data sought by the survey about one community unit within the cable system included: households in the franchise area, subscribers, and line miles of distribution plant; franchise fees; average charges for a range of equipment and supplementary charges and the annual sales or rental volumes of these items as of both September 30, 1992 and November 30, 1986; subscribers, number of channels by origin of programming (local broadcast, satellite-delivered, etc.), and monthly charges for the basic tier and other tiers as of both September 30, 1992 and November 30, 1986; and whether the system provided programming services and was rate regulated in November 1986.

6. The survey also asked respondents whether all franchise areas served by the system had the same rates and channels. Where the system did have a second community unit with different rates and channels, the survey asked respondents to provide the information for both community units. A copy of the survey form is attached to the survey Order, and is available in the docket of this proceeding.

7. Survey responses. We received 708 responses from all the samples combined, a 94.6 percent response rate (by February 17, 1993). Of these, 21 were not included in the database because they were either duplicates or had insufficient information for processing, for instance because some systems were not operational. The six hundred eighty-seven valid responses, a response rate of 91.8 percent, were entered into a computer database to permit staff analysis. (An additional 12 responses were received too late to be entered into the database.) We received 293 valid responses from the 300 cable community units in the random sample (a 97.7 percent response rate), and 97 valid responses from the top 100 systems (a 97 percent response rate).

8. Four hundred twenty of the 687 responses include information about a unique second community unit within the same cable system. There are therefore 1107 usable different community unit responses. Many responses have some information missing. In particular, many responses do not have information relating to 1986 rates, channels, and subscribers, or only have part of this information. However, almost all responses have substantially complete information relating to 1992 rates, channels, and subscribers, as well as information describing the system and the community unit(s).

Data Editing

9. All 687 responses were checked by Commission staff before the data were entered into the computer database. These editors checked the clarity and consistency of the responses.

Where there was doubt about the validity of responses to questions, a follow-up telephone call was made to check the response. Approximately one-quarter to one-third of all survey respondents were called in order to check particular responses. The data were not cross-checked against either published data or the Commission database; not all items of information were checked, and a limited number of logical checks of one data field against another data field were made.

10. Telephone checks were also made to most respondents who indicated that a competitor offered similar services to at least 50 percent of the households in the same franchise area. Calls were also made, in many of these cases, to the relevant franchise authorities and competitors. The purpose of these calls was to gauge the extent of competition and whether the particular community unit was likely to meet one of the legislative definitions of effective competition. Staff also matched responses where different cable operators provided service in the same franchise area.

11. All the community units in the responses were classified according to the extent and type of competition on the basis of the answers to the survey questions, as well as on the basis of telephone calls and other checks. Of the 1107 community units recorded, there are 79 community units facing apparent competition under the statute's first classification (franchise areas with less than 30 percent penetration).[7] There are 46 community units facing apparent competition under the statute's second classification (at least 50 percent of households passed by both competitors and more than 15 percent of households subscribe to the smaller competitor).[8] Finally, there are 16 community units facing apparent competition under the statute's third classification (service provided by either a franchise authority owned cable system or a privately owned cable system competing with

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[7] Of the 79 community units from the first statutory classification, 51 came from the one of the targeted samples (40 from the small, 3 from the overbuild, 7 from the random, and 1 from the top-100). Twenty-eight came from the "second" community unit information (13 from the small, 1 from the overbuild, 9 from the random, 5 from the top-100). The community units were coded in this category according to their responses to the survey.

[8] Of the 46 community units meeting the statute's 50 percent reach/15 percent penetration competition test, 30 came from the targeted samples (21 from overbuild, 4 from random, 4 from small, and 1 from top-100). Sixteen came from the "second" community unit (11 from overbuild, 4 from random, 1 from top-100).

a franchise authority owned cable system passing at least 50 percent of the households).[9]

12. There are also 104 community units where some degree of competition was indicated in the responses but where further checks suggested that the extent of competition did not meet any of the legislative definitions of "effective competition". These community units were not included in the competitive sample, and were classified as "NB."

13. The completed responses were then sent to an outside contractor for entry into a computer database. The computer database was spot checked for accuracy of the data entry. Entries for variables such as subscriber rates, the number of subscribers, and the number of channels that were exceptionally high or low were also checked for accuracy. After the appropriate changes were made, this database was released to the public electroncially, both on-line and on computer diskettes and an opportunity for public comment on the data was provided.[10]

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[9] Of the 16 meeting the statute's third classification, 15 came from the targeted samples (13 from overbuild, 2 from random). One came from the "second" community unit in the random sample. A community unit was coded in this category based upon the response to the survey.

[10] Public Notice No. 31934, released February 24, 1993.

Adjustments made to the data, after release to the public, prior to staff analysis[11]

14. Adjustment to subscriber rates to take out effect of franchise fees. Of the 1107 responses, 904 indicated that they paid franchise fees. Of these, 401 indicated that franchise fees appeared as a separate line item on their subscribers' monthly bills, (i.e., the subscriber rates for the basic and cable programming tier(s) do not include a franchise fee component). The subscriber rates for the basic and cable programming tier(s) of the other 503 responses which paid franchise fees were assumed to include a component to recover franchise fees. Prior to analyzing the data, all rates which apparently included a franchise fee component were adjusted downward so that all subscriber rates are net of franchise fees.

15. The adjustment procedure for the rates in these 503 responses was as follows. For the responses which indicated that franchise fees were incurred as a percentage of basic subscriber revenue, the monthly subscription charge for the basic tier was reduced by the percentage indicated by the respondent. For the responses which indicated that franchise fees were incurred as a percentage of total subscriber revenue, the monthly subscription charge for all tiers was reduced by the percentage indicated by the respondent. For the responses which indicated that franchise fees were incurred as a fixed amount per subscriber, the monthly subscription charge for all tiers was reduced by the same percentage of franchise fees to subscription revenue. For the responses which did not indicate how franchise fees were incurred, the monthly subscription charge for the basic tier was reduced by the percentage of franchise fees to basic subscription revenue.

16. Although these adjustments are not precisely correct in every case, the imprecision is not likely to introduce a significant amount of error, and on a per-channel basis is outweighed by rounding errors. For all tiered services, the unweighted average monthly charge net of franchise fees differs by only $0.30 from the monthly charge including franchise fees. On

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[11] NCTA submitted to the Commission a computer diskette that contained a copy of the released database with several entries changed to correct errors. (Diskette submitted on March 8, 1993.) Since there was not sufficient time to independently verify the correctness of the changes made by NCTA, and we did not think it was appropriate to accept NCTA's changes absent such verification, we did not use NCTA's "corrected" data base in any of our analyses. In addition, we do not have any reason to believe that the use of NCTA's diskette would have substantially changed our overall results. The staff also identified a small number of other errors, which were not corrected, subsequent to the creation of the database.

a per-channel basis the difference is only $0.01. On average, franchise fees are not a very significant component of rates in the data set and the adjustment process described above appears to make sufficient allowance for it.

17. Adjustment to subscriber rates to include the total cost of equipment and supplementary charges. Cable operators differ in how they recover the cost of equipment and supplementary equipment-related services ("equipment") from subscribers. Some cable operators include the total cost in the basic monthly charge (i.e., the charge is bundled), while other operators charge separately for the entire cost or a portion thereof. We asked cable operators to report any separate charges for equipment for the community unit (Schedule 7, lines 1 through 16). We specifically asked for the average charge and quantity data for: installation fee, disconnect fee, reconnect fee, monthly converter box rental, monthly remote control rental, monthly additional outlet fee, and tier changing fee. In order to make the subscriber monthly charges consistent across all cable community units, we added these separate equipment charges to the basic tier subscription rate, so that all basic tier rates would include the total cost of equipment. (In the absence of detailed cost data, it was not possible to subtract the equipment costs that were already bundled into the subscriber monthly charge.)[12]

18. The specific method used to include all equipment revenues in the subscriber monthly charge is as follows. The average charges for installation fee, disconnect fee, reconnect fee and tier changing fee are multiplied by the number of units of each service, respectively, for the last completed fiscal year. These revenue figures are then divided by 12 to get an average monthly revenue figure. The monthly converter box rental, monthly remote control rental and monthly additional outlet fee are also multiplied by their respective average quantities for the last fiscal year to get an average monthly revenue figure. The monthly revenue figures for each of these seven separate charges are summed[13] and then divided by the number of subscribers to the first

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[12] We also asked respondents to list any other equipment and supplementary charges and average volumes, but did not add these revenues to the monthly charge.

[13] In equation form, the revenues from equipment and services were determined as follows (where "S7" refers to Schedule 7 of the survey questionnaire and the variable names are those used in the documentation of the database): equipment and services charge revenues = (S7_IFEE X S7_NIP/12) + (S7_DFEE X S7_FYNDI/12) + (S7_RFEE X S7_FYNRE/12) + (S7_TCFEE X S7_FYATC/12) + S7_CRENT X S7_FYACB) + (S7_RRENT X S7_FYARC) + (S7_AOFEE X S7_FYAAO), where IFEE = installation fee and NIP = the number of installations provided; DFEE = disconnect fee and FYNDI = the number of

tier to get a total equipment charge per month per subscriber. This value was then added to the monthly subscription charge for the basic tier (adjusted for franchise fees) to get the monthly charge which includes the total cost of equipment.

19. There were 64 out of the 1107 records where some information was missing or no information was provided in Schedule 7 of the survey form for equipment and supplementary charges. We concluded that if the cable system to which the community unit belongs earned revenues from equipment charges, then the cable operator probably also charged for equipment at the community unit level, even if some or all the information was missing from Schedule 7. To include no equipment charges for these community units would bias the rate per channel downward. Therefore, for those units we estimated equipment revenue from the system information for these community units and added this estimate to the monthly charge for the basic tier (adjusted for franchise fees) to get a monthly charge which includes an estimate of the total cost of equipment. Using this approach we were able to add equipment charges for 50 of the 64 records that had incomplete information.

20. The specific method used is as follows. The equipment revenues for installation, equipment rental and additional outlets from Schedule 3 for the entire cable system were added together. This number was divided by the sum of basic subscriber revenue plus other tier subscriber revenues for the cable system as a whole, also from Schedule 3 of the survey form, to create a ratio of equipment revenue to the total subscriber revenue for the system.[14] The monthly charge for the individual community unit (adjusted for franchise fees) was then multiplied by 1 plus this equipment ratio to get the monthly charge including equipment revenues.[15]

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disconnections; RFEE = reconnect fee and FYNRE = the number of reconnections; TCFEE = tier changing fee and FYATC = number of tier changes charged for; CRENT = monthly converter box rental and FYACB = average number of converter boxes rented; RRENT = monthly remote control rental and FYARC = average number of remote control units rented; and AOFEE = monthly additional outlet fee and FYARC = average number of additional outlets charged for.

[14] The equipment ratio equals (S3_INSCH + S3_ERENT + S3_AOCHR)/(S3_BASSU + S3_OTHSU), where S3 = Schedule 3; INSCH = installation charges; ERENT = equipment rental; AOCHR = additional outlet charges; BASSU = subscription revenue to basic tier; and OTHSU = other tier subscription revenue.

[15] This estimating process relies on the assumption that the ratio for equipment revenue to total subscriber revenue for the system as a whole is identical to this ratio for the individual

21. We determined this to be a reasonable approach to estimating the revenues from equipment charges. For example, most of the values for a cable community unit's unweighted rate per channel including equipment revenues derived from Schedule 7 are within 10 percent of the value for the unweighted rate per channel including equipment revenues estimated from Schedule 3.

Adjustment to the rate per channel (excluding franchising fees and including equipment) for the regulated tiers for each cable community unit to give more weight to the tiers with a greater number of subscribers.

22. Subscriber rates per channel can be analyzed in a number of ways. For example, subscriber rates for the basic, or first, tier can be examined separately from subscriber rates for the cable programming services (tier 2 and tier 3, if they exist). The analysis described below, however, combined the basic tier and cable programming tier(s). The rate per channel for basic and cable programming services can be combined (aggregated) to create a "composite" rate per channel on an unweighted basis. The unweighted composite rate per channel is the sum of the subscriber monthly charges for the basic tier (excluding franchise fees, including the equipment revenues) and the monthly charges for the cable programming tier(s) divided by the total number of channels on those tiers.[16] This composite represents an average rate, or revenue, per channel if a subscriber purchased all these services.

23. Not all subscribers who purchase the basic tier also purchase the cable programming tier(s). We concluded, therefore, that in creating the composite variable, the rate per channel for each tier should be weighted by the number of subscribers in that tier. In this way, the tiers that have more subscribers count more than the tiers that have fewer subscribers. Obviously, therefore, a tier with very few subscribers counts less than a tier with many subscribers.

24. The specific method used is as follows: equipment revenue per month per subscriber is added to the tier 1 subscriber monthly charge (adjusted for franchise fees). This sum is multiplied by the number of subscribers to tier 1 (subscriber data

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community unit.

[16] The unweighted rate per channel = ((Equipment per month per subscriber + S7_1MC) + S7_2MC + S7_3MC)/(S7_1TS + S7_2TS + S7_3TS). Where S7 = Schedule 7; 1MC = monthly subscription charge for basic tier (after adjustment for franchise fees); 2MC = monthly subscription charge for second tier; 3MC = monthly subscription charge for third tier; 1TS = subscribers to basic tier; 2TS = subscribers to second tier; and 3TS = subscribers to third tier.

were adjusted based on the assumption that all subscribers to the community unit take tier 1). This value is added to the tier 2 monthly charge multiplied by tier 2 subscribers plus the tier 3 monthly charge multiplied by tier 3 subscribers (if these tiers exist). This sum is divided by the sum of the number of channels on each tier multiplied by the number of subscribers to that tier. The resulting number is a subscriber weighted rate per channel, excluding franchise fees and including equipment revenues.[17]

Econometric Estimation

25. Multiple regression analysis was applied to the survey data to determine the effects of competition on the rates charged by cable community units and to isolate characteristics of cable community units that are associated with higher or lower rates. Because costs differ widely across cable community units, it was believed that a single benchmark rate per channel for all community units would be inefficient and unreasonable, allowing high profits for community units with low costs and possibly imposing losses on high-cost community units. In order to take account, at least roughly, of differences in conditions under which cable community units operate, a statistical analysis of community unit and system characteristics associated with higher or lower prices was performed. The results of this analysis were used to calculate a benchmark rate formula that adjusts allowable rates for important community unit and system characteristics.

26. In this analysis, a stepwise regression procedure was first performed to determine what characteristics of cable community units explain the prices charged per channel. This procedure was not an attempt to model demand or supply, but rather an empirical exercise to determine the relationship between prices and various other characteristics of cable community units. The random sample of cable community units was used for this analysis. The dependent variable was the price per channel for all tiers of nonpremium cable service for which data were collected, weighted by tier subscribership and adjusted for franchise fees and equipment and other charges as described above. Although various formulations of the model were tested, ultimately the natural logarithm of price per channel was used.

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[17] In equation form, the subscriber weighted rate per channel excluding franchise fees and including equipment revenues = (((EQ/MO/SUB + S7_1MC) x S7_1TS) + (S7_2MC x S7_2TS) + (S7_3MC x S17_3TS))/((S7_1TTOT x S7_1TS) + (S7_2TTOT x S7_2TS) + (S7_3TTOT x S7_3TS)), where S7, 1MC, 1TS, 2MC, 2TS, 3 MC, and 3TS are as defined supra, and 1TTOT = total number of channels in basic tier; 2TTOT = total number of channels in second tier; and 3TTOT = total number of channels in third tier.

27. The characteristics of cable community units found to have a consistent statistically significant relationship with this price variable were the reciprocal of the number of subscribers to the cable system, the natural logarithm of the number of channels on all the nonpremium tiers offered by the community unit, and the natural logarithm of the number of satellite-delivered channels on all the nonpremium tiers offered by the community unit.[18] Prices per channel decline as the number of channels increases and as the number of subscribers increases. These results are consistent with cable systems having substantial capital costs and overhead expenses that can be spread over more subscribers and over more channels as cable systems expand.[19] Prices per channel increase as the number of satellite channels increases, which is consistent with both program costs for obtaining most satellite channels and with the relatively high value of those services to subscribers. Other characteristics expected to be related to prices, such as density (subscribers per mile) and percentage of plant underground, either were not statistically significant or were not consistently so.

28. To determine the effects of competition on community unit prices, the sample of community units facing "effective competition," by the statutory definition, was added to the random sample. Regression analysis was again performed, using the variables identified above and a dummy variable representing membership in the competitive sample. The equation estimated was the following:

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[18] Taken together, these three variables account for more than 60 percent of the variance in per-channel rates.

[19] As can be seen from tables in Attachment A to Form 393, however, the decline in prices as the number of subscribers increases appears to cease at very low numbers of subscribers.

$$LNP = 2.4448 - 0.0939^{2}(ABC) + 7.3452^{2}(RECIPSUB)$$
$$(3.17) \qquad (2.81)$$

$$- 0.8878^{2}(LNCHAN) + 0.1006^{3}(LNSAT)$$
$$(13.75) \qquad (2.19)$$

where

LNP = natural logarithm of the composite price per channel for up to three tiers of service, weighted and adjusted to exclude franchise fees and include equipment and other subscriber charges as described above;

ABC = 1 if the community unit belongs to one of the categories comprising the statutory definition of "effective competition," as described above, and
= 0 otherwise;

RECIPSUB = 1/number of households subscribing to the cable system;

LNCHAN = natural logarithm of the number of channels in use in the tiers of
service examined; and

LNSAT = natural logarithm of the number of satellite-delivered channels in the tiers of service examined.

The adjusted R^2 is 0.63. N = 377. Numbers in parentheses are t-statistics.

[2] The coefficient is significantly different from zero at the 0.01 level.
[3] The coefficient is significantly different from zero at the 0.05 level.

29. As can be seen from the coefficient of the dummy variable for the competitive sample, the composite price per channel was 9.4 percent lower for the competitive sample than for the random sample, controlling for the effects of number of subscribers, number of channels, and number of satellite-delivered channels. The coefficient was significantly different from zero at the 0.01 level.

30. When a similar regression was run with one dummy variable for the sample with less than 30 percent penetration and a separate dummy variable for the other two components of the "effectively competitive" sample combined, the coefficient of the first variable was positive but not significantly different from zero, while the coefficient of the other variable was -.279 and highly significant. Thus, the prices per channel of the less than 30 percent sample are not significantly different from those of the

random sample, while the prices per channel of the second and third sample combined are approximately 28 percent lower than those of the random sample, controlling for the effects of the other three variables. Community units with less than 30 percent penetration clearly behave very differently from the community units that face competition from other multichannel providers.

31. As noted above, the data set does contain errors, and information on variables likely to affect prices, such as local price levels for goods and services and geographic conditions, was unavailable. As a consequence, the standard errors of the estimates are relatively large. For instance, while the best estimate of the difference in price per channel between the "effectively competitive" sample and the random sample is a negative 9.4 percent, the 95 percent confidence interval for that estimate ranges between -3.6 percent and -15.2 percent. Thus it is quite reasonable to assume that the differential between community units facing effective competition and the random sample of community units <u>not</u> facing effective competition is a 10 percent difference in the price per channel.

32. Several assumptions underlie these estimates. First, the procedure used assumes that the determinants of prices per channel are the same, and have the same association with prices, for competitive and non-competitive community units. It may be, for instance, that community units facing competition are forced to price closer to cost than those with no competition, so that variables reflecting cost are more closely associated with prices than appears to be the case in the random sample. Also, the procedure assumes that prices are in equilibrium. If, for instance, some community units in competitive markets are facing price wars, their prices may be below cost and may not be sustainable in the long run.

33. The benchmark rates per channel were calculated from the regression equation presented above for various numbers of subscribers, channels, and satellite-delivered channels. These rates are shown in the tables contained in attachment A. These rates represent the average price per channel for nonpremium service, appropriately weighted and adjusted, of community units in franchise areas that are "effectively competitive" and that have the given numbers of subscribers, channels, and satellite-delivered channels.

34. Attachment A contains the tables that were generated from the estimating regression equation described above. The tables present benchmark rates per channel for systems with 50, 100, 250, 500, 750, 1000, 1500 and 10,000 subscribers. The tables show the benchmark rates for all combinations of 5-24 channels and 0-24 satellite channels. For systems with 25-100 channels, the tables present the benchmark rates in 5 channel increments, i.e. for 25, 30, 35 channels, etc. For benchmark rate per channel

values in between those increments, cable system owners may either use the interpolation techniques described with the tables or they may choose the closest number of channels and satellite channels that would yield a slightly lower benchmark rate per channel or they may use the regression equation described above to calculate the exact benchmark number to three decimal places.

SEPARATE STATEMENT

OF

COMMISSIONER ANDREW C. BARRETT

RE: Implementation of Sections of the Cable Television Consumer Protection and Competition Act of 1992 (Cable Rate Regulation)

In 1990 I voted for a Report to Congress which recommended competition as a solution to the public's concerns with cable rates.[1] While I still believe that competition is a better solution than regulation of the cable industry, Congress has spoken. It determined through the Cable Television Consumer Protection and Competition Act of 1992[2] that regulation should substitute for competition until effective competition exists in markets. I will not attempt to challenge their conclusions. I believe it is my duty to faithfully apply the statute and to carry out Congressional intent. I write separately to make clear goals throughout this proceeding and to make clear my intent to implement in a manner consistent with the goals of the legislation.

During this proceeding, I have had concerns whether the Federal Communications Commission would implement the provisions on rate regulation in a manner that fully accomplishes Congressional intent. My reading of the statute and the legislative history suggested that Congress intended that the Commission adopt rate standards that closely paralleled the rates consumers would pay for the basic tier of service in a competitive marketplace.[3] For the cable programming tier, Congress mandated that we examine the reasonableness of the

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[1] Report in Docket 89-600 ("6 Year Cable Report"), 5 FCC Rcd 4962 (1990)).

[2] Cable Television Consumer Protection and Competition Act, Pub. L. No. 102-385, 106 Stat. 1460 (1992).

[3] Pursuant to the statute the Commission is to "ensure that the rates for the basic service tier are reasonable. Such regulations shall be designed to achieve the goal of protecting subscribers of any cable system that is not subject to effective competition from rates for the basic service tier that exceed the rates that would be charged for the basic service tier is such cable system were subject to effective competition." Section 623(b)(1).

rates.[4] Ideally, the Commission could examine cost data and determine based on this data and an examination of competitive systems what the correct rates should be for cable systems. The time frame provided for within the statute, the lack of Commission resources and the lack of data make this scheme unworkable.[5]

The Commission ultimately determined that it should rely upon current rate data to ascertain the appropriate rate levels for cable systems. This calculation is imperfect for numerous reasons. I am confident that parties on each side of this issue will dispute our analysis. Numerous commenting parties and our own staff of economists and other professionals have differed over the correct numbers and the methodology to utilize in comparing competitive systems and non-competitive systems. The difference between these numbers has ranged from around 10% to around 30%. One reason for this difference has been use of different criteria to define competitive rates. While Congress provided seven factors that the Commission is required to take into account under the statute, it did not remove the discretion of the Commission as to how best to utilize each factor in defining competitive rates.[6] Some commenting parties have analyzed the data by removing statistics from one or more of the tests. An examination of the Commission's data reveals that the below 30% penetration factor may not be a reliable indicator of competitive rates.[7] Clearly when adopting the effective

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[4] Although I understand the intent of the unitary approach of regulating the basic and cable programming tier pursuant to the same benchmark formula, I am not as confident as my colleagues that Congress did not, by adopting different standards in the Act intend, for different regulatory structures.

[5] My experience at the Illinois Commerce Commission in handling rate cases convinces me that this is not a task the Commission is prepared to take on today.

[6] Congress left to the Commission the obligation to best effectuate Congressional intent. It did not specify the mechanism nor do I believe that it provided a definitive test for competitive rates. The effective competition standard merely establishes the cable systems that are excused from having local franchise authorities and this Commission rate regulate their activities.

[7] As I understand, the data indicate that removal of this factor creates a 27% difference in competitive and non-competitive cable systems. This difference may be explained by the characteristics of these systems or the marketplace realities of using this criteria. The below 30% penetration system may have a low rate of penetration based on excessively high rates,

competition standard, Congress did not have the data we have gathered on this matter.

I examined the record in this proceeding and concluded that if we must err, the statute would encourage us to err on the side of the cable subscriber. However, I also recognized the disparate impact a wrong decision could have on cable companies and their ability to continue to offer the high level of quality programming services. Congress did not intend an unjustified rollback or rates to levels below competitive rates. While I believe that accomplishing Congressional intent requires a rate reduction greater than ten percent, I cannot be certain that this is justified under the statute.[8]

Today, we take a "cautious" approach by adopting the lower percentage difference between competitive and non-competitive systems. We take this <u>first</u> step at accomplishing Congressional intent. It should have some immediate benefits for cable subscribers as rates should be lowered somewhat. I will not attempt to hazard a guess at the total benefit to the public or the benefit to individual subscribers. Whether the ten percent decrease for systems above the benchmark adequately accomplishes our mandate under the statute and Congressional intent is debatable. The adoption of a Further Notice has provided me with a small level of comfort that in fact we may be able to actually determine a more accurate measure of the competitive rates for cable service by this fall. We may find that the ten percent is the correct amount. I have no problems with maintaining this percentage decrease if the data and our studies demonstrate this to be true. The Further Notice will provide us an opportunity to ascertain whether we have the legal authority to consider removing the below 30% percent penetration data and whether, based on this and our examination of the cost data we will gather, the rates should be lowered more than ten percent. I support this scenario with the understanding that we will expeditiously resolve these issues and may require further rate reductions by cable systems before the end on this year.

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they may be newer systems that have higher costs, or they may not be able to spread costs over subscribers as well as larger systems. The data reveals that on average these systems have much higher rates than systems with head-to-head competition.

[8] I remain concerned that our Report and Order may permit some systems which have rates substantially higher than ten percent will only be required to reduce rates ten percent rather than reduce rates fully to the competitive level. These outliers may reap the largest windfall from our actions. I am pleased that we might investigate these operators and order further rate reductions where the system's rates are not justified by their costs plus a reasonable profit.

Finally, I am concerned that our actions do not have an adverse impact on the small cable operators that may be operating at margins that will not permit these rate reductions and who cannot afford to make cost of service showings. This Report and Order relieves them of some administrative burdens, but I would have preferred to ensure that our regulatory net did not curtail their ability to grow and serve their communities.

SEPARATE STATEMENT
OF
COMMISSIONER ERVIN S. DUGGAN

In the Matter of Implementation of the Cable Television Consumer Protection and Competition Act of 1992 -- Rate Regulation
(MM Docket No. 92-266)

Today the Commission, in response to an Act of Congress, takes a significant step to press down the rates that consumers pay for cable television service. No one should doubt how seriously the Commission takes this task, nor how diligently it will continue to pursue the rate-setting effort. We will ensure that the will of Congress is carried out.

Our action is a substantial first step. It represents a diligent effort, under the twin limitations of time and data, to drive cable rates close to the level that consumers would pay if cable television systems faced actual competition.

Our rules make it possible for regulators and the Commission to take four separate, concrete steps:

First, the Commission rolls back current rates to the levels of September 30, 1992. This rollback wipes out rate increases imposed on consumers after the rate-regulation provisions of the Cable Act were passed by the Congress last October. This rollback would apply to all systems with rates above competitive levels.

Second, the Commission sets forth competitive "benchmarks" that could reduce rates an average of another 10 percent. According to economists and statisticians within the Commission, cable systems which do not face competition charge an average of 10 percent more than cable systems subject to "effective competition," as defined by the Congress. The ten percent reduction to a benchmark competitive price tracks that finding. We are also launching a second proceeding today to determine whether, if the "effective competition" definition of the Congress were changed in some way, this competitive differential could be higher, and rate reductions deeper.

Third, the Commission sets in motion a process for dealing with "outliers"--- cable systems whose rates, after the first two cuts, remain substantially above our competitive benchmarks. Those systems will be subject to searching investigation. The FCC will seek to determine whether those operators are charging higher rates because of higher costs or whether the real explanation is abuse of market power. Systems found to be abusing their power in the marketplace will be subject to further rollbacks. I expressly advocated this stricter scrutiny of outlier systems, although I will insist on full due process for all who face this scrutiny.

Fourth, the Commission imposes caps on future rate increases. Rate hikes in the future will be limited to the general inflation index and to limited increases in specifically defined costs.

Despite these clear prospects for rate rollbacks substantially exceeding 10 percent, and despite this Commission's clear determination to pursue the rate-setting process faithfully, some will claim that the FCC has not gone far enough to lower cable rates. They may argue, perhaps, that we should have yanked every system down to the benchmarks, or that we should have required much larger across-the-board rollbacks. Those arguments unfortunately collide with the facts, and ignore five months of effort by dedicated public servants here. Those experts have made a plain reading of the statute; and they have recommended a significant first phase of rate regulation based on data that consistently reflected a 10 percent competitive differential between competitive and non-competitive rates. To require deeper, blanket rollbacks for every system at the outset could force prices for some systems below cost and, in any event, would fall disproportionately hard on the country's smallest cable systems. The best minds here were reluctant--- justifiably reluctant, I believe--- to be so radical.

Those who ask, "Why not more?" will be furiously opposed, on the other side, by those who ask, "Why so much?" To that second group I say that this Commission's experts have made careful estimates of a proper rate-setting approach. Operators who feel that the treatment accorded them is unfair or unwarranted by the facts will have ample opportunity to appeal.

Government regulation is, of necessity, a blunt instrument. Congress in its wisdom has provided a relief valve, however: It has provided that rate regulation will end when true competition in the video marketplace begins. In a world in which Direct Broadcast Satellites (DBS), video dialtone, and various forms of wireless cable are now emerging, perhaps we can consider this step a transitional step--- toward real competition, which will achieve the goals of fair rates and good service that all of us seek.

Make no mistake, however: This Commission will not shirk its regulatory responsibilities while waiting for that day. We will continue to refine our approach to rate regulation, with local franchising authorities as full partners in that effort. Today's action is the beginning, not the end, of the process.

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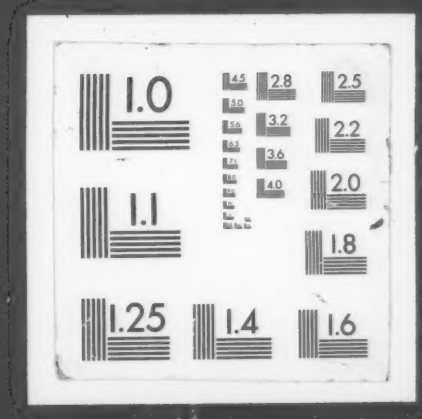
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